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1955

THE

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OF THE INCORPORATED COUNCIL OF LAW REPORTING

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

AND DECISIONS IN

THE COURT OF CRIMINAL APPEAL

◆

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OF

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Appl. applied
Appr. approved
C. considered
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Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
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"City of Lincoln" (Owners) *v.* Smith	[1904] A.C. 250	*R.*	185
Clark *v.* Epsom Rural District Council	[1929] 1 Ch. 287; 45 T.L.R. 106		420
Collins, *In re*	[1950] Ch. 498		421
Collins *v.* Panama	197 Fed.R. 983	*R.*	182
Condon *v.* Great Southern and Western Railway Co.	16 Ir.C.L. 415	*R.*	358
Conrad *v.* Waples	96 U.S. 279		528
Cooke *v.* Midland Great Western Railway of Ireland	[1909] A.C. 229	*R.*	462, 468, 473
Coplans *v.* King	[1947] 2 All E.R. 393	*Appl.*	151, 153–7
Cosgrove *v.* Horsfall	62 T.L.R. 140	*Appl.*	158, 171, 181, 184, 187–90, 194, 196, 198, 199
Cottle *v.* Cottle	[1939] W.N. 205; [1939] 2 All E.R. 535	*R.*	51
Cowley *v.* Newmarket Local Board	[1892] A.C. 345; 8 T.L.R. 788	*R.*	415
Cowper *v.* Cowper	2 P.Wms. 720	*Appl.*	234, 237
Crisp *v.* Bunbury	8 Bing. 394	*R.*	231
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Daimler Co. Ld. *v.* Continental Tyre and Rubber Co. (Great Britain) Ld.	[1916] 2 A.C. 307; 32 T.L.R. 624	*C.*	515, 533–6
Dampskibsselskabet Botnia A/S *v.* C. P. Bell & Co.	[1932] 2 K.B. 569; 48 T.L.R. 93		434
Davies *v.* Grand Junction Canal (Proprietors)	3 H.L.C. 759		47
Davies *v.* Powell Duffryn Associated Collieries Ld.	[1942] A.C. 601	*R.*	18
Davies *v.* Powell Duffryn Associated Collieries Ld.	[1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657		353
Davies *v.* Swan Motor Co. (Swansea) Ld.	[1949] 2 K.B. 291; 65 T.L.R. 278; [1949] 1 All E.R. 620		476
De Francesco *v.* Barnum	63 L.T. 514; 6 T.L.R. 486	*R.*	276, 279
Dean *v.* Prince	[1954] Ch. 409; [1954] 1 All E.R. 749	*R.*	228
Denny, Mott & Dickson Ld. *v.* James B. Fraser & Co. Ld.	[1944] A.C. 265; 60 T.L.R. 419		531
Director of Public Prosecutions *v.* Kent and Sussex Contractors Ld.	[1944] K.B. 146; 60 T.L.R. 175; [1944] 1 All E.R. 119		84
Ditcham *v.* Bond	2 M. & S. 436	*R.*	282
Doe *d.* Bishop of Rochester *v.* Bridges	1 B. & Ad. 847	*R.*	413, 414
Doe *d.* Stevens *v.* Lord	6 Dowl. 256	*C.*	559, 563
Durnford *v.* Baker	[1924] 2 K.B. 587; 40 T.L.R. 757	*R.*	582
Duty on Estate of Institution of Civil Engineers, *In re*	20 Q.B.D. 621		324, 337
Eager *v.* Grimwood	1 Ex. 61		277
East Midlands Gas Board *v.* Doncaster Corporation	[1953] 1 W.L.R. 54; [1953] 1 All E.R. 54		224
Eckersley *v.* Mersey Docks and Harbour Board	[1894] 2 Q.B. 667	*R.*	48
Edwards *v.* Railway Executive	[1952] A.C. 737; [1952] 2 T.L.R. 237; [1952] 2 All E.R. 430	*R.*	456
Egyptian Delta Land and Investment Co. Ld. *v.* Todd	[1929] A.C. 1; 44 T.L.R. 747	*R.*	535
Elder Dempster & Co. *v.* Paterson Zochonis & Co. Ld.	[1923] 1 K.B. 240; [1924] A.C. 522; 40 T.L.R. 464	*Dist.*	158, 163–73, 181, 182, 184, 189–96, 198, 199
Elders and Fyffes Ld. *v.* Hamburg Amerikanische Packetfahrt Actien Gesellschaft	34 T.L.R. 4, 275	*C.*	515, 534
Epps *v.* Rothnie	[1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146	*R.*	373, 375, 379, 381, 385
Ertel Bieber & Co. *v.* Rio Tinto Co. Ld.	[1918] A.C. 260; 34 T.L.R. 208	*Appl.*	517, 536, 537
Esposito *v.* Bowden	7 E. & B. 763		526
Evans *v.* Dell	53 T.L.R. 310; [1937] 1 All E.R. 349	*R.*	95

Evans *v.* Evans	1 Hagg.Con. 35, 105	*R.*	394
Feay *v.* Barnwell	[1938] 1 All E.R. 31	*R.*	360
Ferguson *v.* Weaving	[1951] 1 K.B. 814; [1951] 1 T.L.R. 465; [1951] 1 All E.R. 412	*R.*	91
Filburn *v.* People's Palace and Aquarium Ld.	25 Q.B.D. 258; 6 T.L.R. 402	*R.*	266
Fine Art Society Ld. *v.* Union Bank of London Ld.	17 Q.B.D. 705; 2 T.L.R. 883		210
Fletcher *v.* Rylands	L.R. 3 H.L. 330	*R.*	270
Flower *v.* Ebbw Vale Steel, Iron and Coal Co. Ld.	[1934] 2 K.B. 132	*R.*	482
Forbes *v.* Cochrane	3 B. & C. 448		278
Ford *v.* Jarka	[1954] A.M.C. 1095	*R.*	182
Fosbroke-Hobbes *v.* Airwork Ld.	[1937] 1 All E.R. 108		177
Fowle *v.* Bell	[1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668	*C.*	363, 375–7, 379, 381, 385, 387
Franklin *v.* South Eastern Railway Co.	3 H. & N. 211	*R.*	358, 359
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Freeman *v.* Cooke	2 Exch. 654	*R.*	213
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Garnsworthy *v.* Pyne	35 J.P. 21		574
Gasque *v.* Inland Revenue Commissioners	[1940] 2 K.B. 80; 56 T.L.R. 683	*R.*	535, 536
Gateshead Union *v.* Durham County Council	[1918] 1 Ch. 146	*Dist.*	409, 425, 428–30
Gifford *v.* Whittaker	[1942] 1 K.B. 501; 58 T.L.R. 195; [1942] 1 All E.R. 604	*R.*	95, 96
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Gillingham Corporation *v.* Kent County Council	[1953] Ch. 37		225
Gillingham Corporation *v.* Kent County Council	[1952] 2 All E.R. 1107		419
Gillow *v.* Durham County Council	[1913] A.C. 54		419
Glasgow Corporation *v.* Muir	[1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44		477
Glasgow Corporation *v.* Taylor	[1922] 1 A.C. 44; 38 T.L.R. 102	*Appl.*	450, 464, 465, 468, 469, 471, 472
Glossop *v.* Heston and Isleworth Local Board	12 Ch.D. 102		421
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Goldthorpe *v.* Bain	[1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23	*E.*	151, 155, 157
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Greenberg *v.* Cooperstein	[1926] 1 Ch. 657	*Appl.*	40
Gresham Life Assurance Society *v.* Styles	[1892] A.C. 309; 8 T.L.R. 618		32
Griffith, *In re*	12 Ch.D. 655		74
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Groves *v.* Lord Wimborne	[1898] 2 Q.B. 402	*R.*	415
Guest *v.* Iraq Petroleum Co. Ld.	Unreported. (C.A. Judgts. 1954, No. 142)	*R.*	572
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Healey *v.* Minister of Health	[1954] 2 Q.B. 221; [1954] 3 All E.R. 449		419
Heatley *v.* Steel Company of Wales Ld.	[1953] 1 W.L.R. 405	*R.*	21
Hemmings *v.* Stoke Poges Golf Club	[1920] 1 K.B. 720; 36 T.L.R. 77	*Appl.*	559, 562
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Inland Revenue Commissioners *v.* Forrest	15 App.Cas. 334; 6 T.L.R. 456	*C.*	318, 328, 334–7, 339, 347, 348
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Johnson *v.* Hill	[1945] 2 All E.R. 272	*R.*	21
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Joseph Crosfield & Sons Ld. *v.* Manchester Ship Canal Co.	[1904] 2 Ch. 123	*R.*	231
Keighley, Maxsted & Co. *v.* Durant	[1901] A.C. 240; 17 T.L.R. 527	*R.*	120
Kite, The	[1933] P. 154	*R.*	177
Knott *v.* London County Council	[1934] 1 K.B. 126; 50 T.L.R. 55	*Appl.*	253, 258, 267, 269
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Land Settlement Association Ld. *v.* Carr	[1944] 1 K.B. 657; 60 T.L.R. 488; [1944] 2 All E.R. 126	*R.*	218
Latham *v.* R. Johnson & Nephew Ld.	[1913] 1 K.B. 398; 29 T.L.R. 124	*R.*	457, 458, 463, 464, 472
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Lilley *v.* Doubleday	7 Q.B.D. 510	*R.*	295
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Lockwood *v.* Lowe	[1954] 2 Q.B. 267; [1954] 1 All E.R. 472	*Appl.*	58, 61
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Marlor *v.* Ball	16 T.L.R. 239	*R.*	266
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Meunier, *In re*	[1894] 2 Q.B. 415		544
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Midland Bank Ld. *v.* Reckitt	[1933] A.C. 1; 48 T.L.R. 271	*R.*	211
Midland Railway *v.* Sharpe	[1904] A.C. 349		34
Monk *v.* Warbey	[1935] 1 K.B. 75; 51 T.L.R. 77	*R.*	415
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Morley *v.* Staffordshire County Council	[1939] 4 All E.R. 92	*R.*	467, 468, 472
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National Assistance Board *v.* Prisk	[1954] 1 W.L.R. 443; [1954] 1 All E.R. 400	*Appl.*	487, 497, 498
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Pearks, Gunston & Tee Ld. *v.* Ward	[1902] 2 K.B. 1; 18 T.L.R. 538		85
Pearson *v.* Coleman Bros.	[1948] 2 K.B. 359; [1948] 2 All E.R. 274		256
Peebles *v.* Oswaldtwistle Urban District Council	[1897] 1 Q.B. 625; 13 T.L.R. 297		420
Peek *v.* North Staffordshire Railway Co.	10 H.L.C. 473	*R.*	180
Powell *v.* Cleland	[1948] 1 K.B. 262; [1947] W.N. 304; 63 T.L.R. 266; [1947] 2 All E.R. 672		366
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Reg. *v.* Maurer	10 Q.B.D. 513	*R.*	552
Reg. *v.* Meyer	1 Q.B.D. 173		47
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Reg. *v.* Nottingham Quarter Sessions, *Ex p.* Harlow	[1952] 2 Q.B. 601		54
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Rex *v.* Essex Justices, *Ex p.* Perkins	[1927] 2 K.B. 475; 43 T.L.R. 415		45, 50
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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

MORELLE LD. *v.* WATERWORTH.

[Plaint No. K.P. 55.]

RODNALL LD. *v.* LUDBROOK.

[Plaint No. K.P. 56.]

C. A.

1954
June 16.

Singleton, Denning and Morris L.JJ.

Company — Foreign company — Mortmain — Corporation purporting to hold residue of lease of land in United Kingdom—No licence in mortmain obtained from Crown—No compliance with Companies Acts requirements for holding land—Land forfeit to Crown from date of assignment—No right of action by company against tenant —Mortmain and Charitable Uses Act, 1888 (51 & 52 *Vict. c.* 42), *ss.* 1 (1), 2, 10—*Mortmain and Charitable Uses Act,* 1891 (54 & 55 *Vict. c.* 73), *s.* 3.
Mortmain—Lease.

A company registered in Eire, neither incorporated nor registered under the Companies Acts and having no place of business in this country, purported to acquire by assignment the residue of a 99-year lease of house property in London, and served notice to quit on the tenant. On a preliminary point the tenant contended that as the company did not hold the land under the authority of any statute and had not obtained a licence in mortmain, they had forfeited it to the Crown under the provisions of section 1 of the Mortmain and Charitable Uses Act, 1888. The company contended that a licence was not necessary where land was held under a short lease:—

Held, that a short lease or the residue of a lease was an assurance of land to a corporation in mortmain within the meaning of the Act of 1888; that the company, having neither statutory authority nor a licence to hold the lease were in breach of section 1 of that Act; and that accordingly they could not sustain proceedings against the tenant since the property was forfeit to the Crown from the date of the assurance.

Per Denning L.J. A foreign company which does not establish any business office in England and does not register itself in any way is a modern instance of a dead hand (mortmain) for it puts itself in a position, if not to defeat its obligations entirely, at least to make it most difficult for dues to be collected from it.

Dictum of Wills J. in *Truro Corporation* v. *Rowe* [1901] 2 K.B. 870, 875; 17 T.L.R. 773; (on appeal [1902] 2 K.B. 709) disapproved.

Appeals from Judge Wilfrid Clothier, sitting at Lambeth County Court.

The plaintiffs in two county court actions, Morelle Ld. and Rodnall Ld., which were limited companies registered in the Republic of Eire, with registered offices in Dublin, claimed possession of two dwelling-houses in South London from the respective tenants, Anne Waterworth and Emily Ludbrook, on the ground that the tenants had committed breaches of covenant by subletting parts of the premises. They had previously served on the tenants notices to quit.

The defendant Waterworth in the first action asked the plaintiff company Morelle Ld. for further and better particulars of the claim, and in particular asked for (1) details of the title of the company to the premises in question, and (2) whether the company had a licence in mortmain to hold the premises, and if so, the date and particulars of that licence.

By their reply the company stated (1) that they had acquired the property by assignment (of a 99-year lease with 19 years to run) in November, 1950, and (2) that they had no licence in mortmain, but that such a licence was not necessary where land was held under a short lease. They referred the defendant to the decision in *Truro Corporation* v. *Rowe*,[1] and to a note in Tudor on Charities (5th ed. p. 415), and contended that a lease was not an assurance in mortmain unless it was for so long a term as to amount to a permanent grant under colour of a lease.

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[1] [1901] 2 K.B. 870; 17 T.L.R. 773; on appeal [1902] 2 K.B. 709.

By her defence the tenant relied on those facts and contended that the plaintiffs, by their own admission having no licence in mortmain to acquire or hold the property, had forfeited it by virtue of the provisions of the Mortmain and Charitable Uses Act, 1888, s. 1,[2] and that their assertions of law were bad.

No particulars were asked for or given in the second action, as the county court judge considered both cases together on the preliminary point of law, and on April 8, 1954, gave judgment for the defendants, holding that under the Mortmain and Charitable Uses Act, 1888, and the amending Act of 1891, land could not be held by a corporation save by licence in mortmain from the Crown, unless the company was incorporated or registered under the Companies Acts; and that as the two companies in question were neither incorporated nor registered in the United Kingdom but were foreign companies not holding a licence, they had no right to sue the tenants for rent nor to demand possession of the premises.

The plaintiff companies appealed and asked for a new trial.

J. P. Widgery and *J. M. Cope* for the companies. A licence in mortmain is not necessary to enable a foreign corporation to hold a short lease of land in this country, though it is conceded that a licence is necessary for a long lease. The interest acquired by Morelle Ld. was the residue of a 99-year lease, or, alternatively, was, for the purposes of the Mortmain and Charitable Uses Act, 1888, a 19-year lease only.

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[2] Mortmain and Charitable Uses Act, 1888, s. 1: "(1) Land shall not "be assured to or for the benefit of, "or acquired by or on behalf of, any "corporation in mortmain, otherwise "than under the authority of a licence "from Her Majesty the Queen, or of "a statute for the time being in "force, and if any land is so assured "otherwise than as aforesaid the land "shall be forfeited to Her Majesty "from the date of the assurance, and "Her Majesty may enter on and hold "the land accordingly: . . ."

S. 2: "It shall be lawful for Her "Majesty the Queen, if and when "and in such form as she thinks fit, "to grant to any person or corpora- "tion a licence to assure in mortmain "land in perpetuity or otherwise, "and to grant to any corporation a "licence to acquire land in mortmain "and to hold the land in perpetuity "or otherwise."

S. 10: "In this Act, unless the con- "text otherwise requires,—(i) 'Assur- "'ance' includes a gift, conveyance, "appointment, lease, transfer, settle- "ment, mortgage, charge, incum- "brance, devise, bequest, and every "other assurance by deed, will, or "other instrument; and 'assure' and "'assuror' have meanings corre- "sponding with assurance. . . ."

Mortmain and Charitable Uses Act, 1891, s. 3: "Land in the Mortmain "and Charitable Uses Act, 1888, . . . "shall include tenements and here- "ditaments, corporeal or incorporeal, "of any tenure, but not money secured "on land or other personal estate "arising from or connected with land. ". . ."

[Singleton L.J. But the lease does not change its character as the unexpired term becomes shorter. It remains a 99-year lease throughout its term.]

Whether it is a 99-year lease or may be treated for the purposes of the Act as a 19-year lease, it is outside the mischief at which all the Statutes of Mortmain since 1279 have been directed. The mischief was that of land being held by a corporation, a body which would never die, for periods beyond the span of human life, thus depriving the Crown or the lord of the revenue arising on death or change of tenant. Before 1888, as the authorities show, the present lease would not have offended against the law of mortmain; and on a true construction of the Act of 1888 the same consequences follow today. The words "an assurance . . . in "mortmain" in section 1 of that Act mean in substance only an assurance which would formerly have offended against the law of mortmain. The important words are "in mortmain." They are nowhere defined, and therefore bear the implication of their former interpretation. They would be meaningless if all leases were within the scope of section 1.

A note in Tudor on Charities, 5th ed., p. 415, which appeared in the 1889 edition and has survived to the current edition, states that it has been held that a lease for 100 years is within the Mortmain Statutes, but not a lease for 20, 40, or even 99 years. That covers the present case. All the cases cited in the note are very old, except *Truro Corporation* v. *Rowe*,[3] the only case decided on this point since the Act of 1888. In that case Wills J. said that the Mortmain Statutes did not apply to a short lease of 14 years[4]; that constitutes authority for the proposition that even since the Act of 1888 the mortmain rules do not apply to a short lease.

[Morris L.J. The note on "Mortmain" in volume 8 of Halsbury's Laws of England, 2nd ed., ((*g*) at p. 83) states that the attention of Wills J. was not drawn to the point that "assurance" in the Act of 1888 included the word "lease."]

It is submitted that his decision would have been the same if his attention had been directed to the point. The words "in "mortmain" are sufficient to preserve the authority of the old cases in regard to short leases, though it is conceded that the decision in *Vigers* v. *Dean and Chapter of St. Pauls*[5] that the Statutes of Mortmain did not apply to a leasehold cannot stand in view of the definition of "assurance" in the Act of 1888. The definition in the Act does not distinguish between short and long leaseholds. The short term did not impose the "dead hand."

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[3] [1901] 2 K.B. 870; 17 T.L.R. 773.

[4] [1901] 2 K.B. 870, 875.

[5] (1849) 18 L.J.Q.B. 97.

[DENNING L.J. A foreign company which cannot be sued is a modern analogy to the dead hand.]

Further, if, contrary to the above submission, a short lease is within the scope of section 1, then it is submitted that the forfeiture to the Crown was not complete until the Crown had taken some step to assert its right to the reversion and, accordingly, the company was entitled to the land when the summons for possession was issued, and can exercise its rights until the right of ouster has been asserted.

K. R. Bagnall for the tenant Waterworth. All that this foreign company need do to obtain a licence is to apply formally to Her Majesty through the Home Secretary under section 2 of the Act of 1888. That is still done in certain cases where it is advantageous for the foreign company to obtain a licence rather than to register under the Companies Acts.

In section 10 of the Act of 1888, as in more recent statutes, both "assurance" and "land" are defined so as to mean that the alienation of an interest in land is not limited to any particular period of years. The words "in mortmain" relied on by the plaintiff company apply to the "corporation" and not to the "assurance." There is no business inconvenience or difficulty in the way of a foreign company holding land here: see sections 407 and 408 of the Companies Act, 1948. The note on "Mortmain" in volume 8 of Halsbury's Laws of England, 2nd ed., at p. 83, correctly distinguishes *Truro Corporation* v. *Rowe*,[6] for the full argument on this point was not before Wills J.; that appears clear from the report of the Court of Appeal decision in *Truro's* case.[7]

Further, though the original Statute of Mortmain specifically provided that entry should be within a year from the alienation, the land is, under the clear wording of the Act of 1888, forfeit to the Crown from the date of the assurance.

Arthur Mildon for the tenant Ludbrook. No matter how short the lease, it is covered by the Act of 1888, for section 1, read with the definition section 10, provides: "any estate or interest in "land" "shall not be assured to or for the benefit of a corpora-"tion in mortmain." That is clearly intended to prevent a corporation avoiding the modern equivalent of feudal dues. One of the remedies for non-payment of rent by the tenants of these properties would be a claim by the landlord for a forfeiture; but as here the land was forfeit to the Crown "from the date of the "assurance," these companies could not sustain any such claim.

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[6] [1901] 2 K.B. 870.

[7] [1902] 2 K.B. 709.

SINGLETON L.J. We heard these two appeals together, as we were assured by counsel that the decision in one would cover the other. I propose to deal with the first case alone, the appeal of Morelle Ld. against Mrs. Waterworth. [His Lordship stated the facts, read the relevant parts of the pleadings and continued:] The question arises under section 1 of the Mortmain and Charitable Uses Act, 1888, an Act to consolidate and amend the law relating to mortmain and to the disposition of land for charitable uses. [His Lordship read sections 1 (1) and 2 of the Act of 1888 and continued:] I draw attention to the words "in "perpetuity or otherwise."

The answer raised by and on behalf of Mrs. Waterworth was that the plaintiff company, not having a licence in mortmain to acquire and hold the said property, had forfeited the same by virtue of the provisions of section 1 of the Mortmain and Charitable Uses Act, 1888.

The case on behalf of the plaintiff company was that the assurance or assignment of the reversion of the lease to them did not fall within section 1 of the Act of 1888 because the company only acquired the residue of a lease, which lease, indeed, it was claimed was not covered by section 1 of the Act. We were told by Mr. Widgery that the person from whom the company acquired the residue of the term had a 99-year lease, and that there were about 19 years of that lease to run at the time of the assignment of the residue of the term to his clients.

Section 10 of the Act of 1888 is the definition section: "(i) 'Assurance' includes a gift, conveyance, appointment, "lease, transfer, settlement, mortgage, charge, incumbrance, "devise, bequest, and every other assurance by deed, will, or "other instrument; and 'assure' and 'assuror' have meanings "corresponding with assurance. . . . (iii): 'Land' includes "tenements and hereditaments corporeal and incorporeal of "whatsoever tenure, and any estate and interest in land." The concluding words "and any estate and interest in land" were struck out by section 3 of the Act of 1891. The alteration made by the Statute Law Revision Act, 1908, is not material.

Mr. Widgery, on behalf of the plaintiffs, submitted that the transfer or assignment to his clients of the residue of the lease was not an assurance for the benefit of a corporation in mortmain.

He submitted that no question of mortmain arose unless the lease was a long lease, and he claimed in aid the note in Tudor on Charities (5th ed. p. 415) under section 1 of the Act of 1888: "It has been held that a lease for a long term, as one "hundred years or two hundred years, is within the Mortmain "Statutes, but not a lease of twenty, forty, or even ninety-nine "years." Then there is a reference to the *Abbot of Boxley's Case*[1] and to *Truro Corporation* v. *Rowe*.[2] The note continues: "It was considered, however, in *Vigers* v. *Dean and Chapter* "*of St. Paul's*[3] that the Statutes of Mortmain only forbade a "corporation to hold that which was in itself perpetual; and if "this be so, the grant of a lease cannot be mortmain unless it "is for a term which may be considered to be equivalent to an "absolute alienation."

It appears to me that that note does not pay sufficient attention to the words of the section itself. The note continues: "A grant of a rent-charge to an abbot and his successors for "eighty years was held to be a mortmain;" and there is another reference to the *Abbot of Boxley's Case*.[4]

It was pointed out to us that in volume 8 of Halsbury's Laws of England, 2nd ed., the note under "Mortmain" ((*g*) at p. 83) is not in agreement with that which is stated in Tudor on Charities. This is the note: "'Assurance,' for this purpose, includes a gift, "conveyance, appointment, lease, transfer, settlement, mort-"gage, charge, incumbrance, devise, bequest, and every other "assurance by deed, will, codicil, or other instrument. . . . "Formerly it was held that leases for long terms, as 100 or 200 "years, were alienations in mortmain, but not leases for 20, "40, or even 99 years. . . . In *Vigers* v. *St. Paul's* (*Dean, etc.*)[5] "it was considered that the mortmain restrictions were aimed "only at preventing corporations holding that which was per-"petual. These authorities, however, were all earlier than the "Mortmain and Charitable Uses Act, 1888. In *Truro Corpora-*"*tion* v. *Rowe*[6] the point that 'assurance' includes 'lease' "was not brought before the notice of the court, and it was there "held that the Statutes of Mortmain had nothing to do with "short leases, a decision which, though applicable to the old "Mortmain Statutes, cannot be supported in connexion with the "Act of 1888."

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[1] (1426) Y.B. 4 Hen. 6, fol. 9, pl. 1.

[2] [1901] 2 K.B. 870; 17 T.L.R. 773.

[3] (1849) 18 L.J.Q.B. 97.

[4] Y.B. 4 Hen. 6, fol. 9, pl. 1.

[5] 18 L.J.Q.B. 97.

[6] [1901] 2 K.B. 870.

Truro Corporation v. *Rowe*[6] was before the court of first instance in August, 1901, and Wills J. in his judgment said[7]: "The Statutes of Mortmain appear to me to have nothing to "do with a short lease of 14 years. It does not seem to be "open to the class of objections which gave rise to the Statutes "of Mortmain; and I find that both Shelford (The Law of "Mortmain, ed. 1836, p. 9) and Tudor (Charitable Trusts, 3rd "ed. 1889, p. 382) treat this as clear law, and give a number of "authorities for the proposition. These objections, therefore, "may be shortly dealt with and put on one side; and I may add "that, as the Statutes of Mortmain do not apply, the licence to "hold lands in fee, which it is plain from the charter of "Elizabeth existed in the old charters, and which had no "application to leaseholds, is equally beside the question."

I think it is clear that the note in Halsbury expresses the position accurately, and that the point for decision in this case was not argued before Wills J.; and that would appear to be so from the reference to the report of the case in the Court of Appeal to which we were referred.

There are two other extracts which are useful. In the Introduction to Tudor on Charities (5th ed. p. 1) there appears this passage: "Alienation in mortmain, in mortua manu, is an "alienation of lands or tenements to any corporation, sole or "aggregate, ecclesiastical or temporal." In Stroud's Judicial Dictionary I find almost the same definition of "mortmain": "'Mortmain' signifies an alienation of lands and tenements "to any guild, corporation, or fraternity, and their successors, "e.g., bishops, parsons, vicars, etc.," and there is a reference to Cowel's Termes de la Ley. Alienation for this purpose means a transfer or conveyance of property to another.

If, then, there is an alienation of lands to a foreign corporation, such as is for this purpose Morelle Ld., it seems to me that the question of mortmain arises. I cannot go with the argument of Mr. Widgery that one has to look at the section in order to see whether there is a long lease or a short lease. There had been granted at some time a 99-year lease of the premises in question. That lease, it is claimed by the company, came into the company's ownership; they became the holders of the residue of the lease by assignment. Thus they claimed to hold a 99-year lease or the residue of a 99-year lease, and it seems to me that that falls within the provisions of section 1 (1) of the Mortmain

[6] [1901] 2 K.B. 870.

[7] Ibid. 875.

and Charitable Uses Act, 1888. If I am wrong in that view, it would be necessary each time to look at the length of a lease and to say whether it was within the provisions of the section. I cannot think that that is necessary from any point of view, and I am confirmed in that view by the fact that in section 2 of the Act there is a provision that Her Majesty may grant to any person or corporation a licence to assure in mortmain land in perpetuity or otherwise.

This case falls within the provisions of section 1 (1). The plaintiff company was a company registered in Eire and not in this country; it had no licence or authority, and consequently there was a breach of the terms of section 1 (1) of the Act. It follows from the wording of the Act that if the land is so assured otherwise than as aforesaid, "the land shall be forfeited to Her "Majesty from the date of the assurance, and Her Majesty may "enter on and hold the land accordingly." The appeal of the plaintiff company fails.

I desire to add a few words because of the importance of the case. There is no difficulty in the ordinary way in a company, whether registered under the Companies Acts or whether registered abroad, holding land. Section 14 (1) of the Companies Act, 1948, provides: "A company incorporated under this Act shall "have power to hold lands, and as regards lands in any part of "the United Kingdom without licence in mortmain."

Section 408 of the Companies Act, 1948, provides: "Where "an oversea company has delivered to the registrar of companies "—(*a*) in the case of a company to which subsection (1) of the "last foregoing section applies, the documents and particulars "therein mentioned; (*b*) in the case of a company mentioned "in subsection (1) or (2) of section three hundred and forty-four "of the Companies Act, 1929, the documents and particulars "specified in subsection (1) of that section; (*c*) in the case of any "other company, the documents and particulars specified in "paragraphs (*a*), (*b*) and (*c*) of subsection (1) of section two "hundred and seventy-four of the Companies (Consolidation) "Act, 1908, as amended by the Companies (Particulars as to "Directors) Act, 1917; it shall have the same power to hold "lands in the United Kingdom as if it were a company incorporated under this Act: Provided that nothing in this section "shall affect the power of a company to hold lands by virtue "of registration in Northern Ireland."

By section 407 (1) of the Act of 1948: "Oversea companies "which, after the commencement of this Act, establish a

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"place of business within Great Britain shall, within one month "of the establishment of the place of business, deliver to the "registrar of companies for registration:—(*a*) a certified copy of "the charter, statutes or memorandum and articles of the "company or other instrument constituting or defining the "constitution of the company, and, if the instrument is not "written in the English language, a certified translation thereof; "(*b*) a list of the directors and secretary of the company containing the particulars mentioned in the next following subsection; (*c*) the names and addresses of some one or more "persons resident in Great Britain authorized to accept on "behalf of the company service of process and any notices "required to be served on the company."

Thus it will be seen that an oversea company (within which description the plaintiff company Morelle Ld. falls) may hold property in just the same way as a company registered in this country if it follows the procedure laid down in sections 407 and 408 of the Companies Act, 1948. This company did neither; nor did it apply for a licence.

The county court judge, in the course of his judgment, said: "I am invited to dismiss these actions on grounds urged by "Mr. Bagnall that the plaintiff Irish companies have no right to "own the properties. Before a company can hold land as part "of its permanent possessions a licence in mortmain is necessary: "the principal Acts are those of 1888 and 1891. Under those "Acts land may not be held by a corporation save by licence 'from the Crown unless the company is incorporated or registered "under the Companies Act. Companies not incorporated or "registered have no right to hold land unless they have a licence." The county court judge considered the judgment of Wills J. to which I have referred, and held that he ought not to follow it on the facts of this case, as the relevant matters for consideration had not been before Wills J. I agree with the county court judge, and, in my view, the appeal should be dismissed.

Denning L.J. asked this morning what was the purpose of this; why did the company register itself in Eire, or why was an Irish company holding property in South-East London? It appears from what we have been told that the plaintiff company, Morelle Ld., and the company Rodnall Ld., the appellants in the second case, are in just the same position. Both companies are in Eire; both have acquired properties in south-east London. How many properties they have and how and when they came to acquire them I do not know. The case gives rise to some interesting speculations, which have been mentioned. One is that if the company has not a place of business in this country it is rather difficult to serve it with notices under the Housing Acts or under other Acts. I draw attention to section 407 (1) (*c*) of the Companies Act, 1948, and to the provision requiring " the " names and addresses of some one or more persons resident in " Great Britain authorized to accept on behalf of the company " service of process and any notices required to be served on the " company." That is if a company is carrying on business in this country. If the company has no place of business in this country and is an oversea company, I do not know how notices could be served so as to be effective. That may be the reason for an oversea company holding property here remaining without a place of business in this country. It may be, too, as was suggested, that it is regarded by the company as being some help to them in regard to revenue questions, although I hope that the revenue authorities can look after that side of the matter; and it may be that if the company has no place of business in this country, the collection of rates by the local authority is made more difficult in the case of house property such as this. One of the counsel told us that this was not the only case of the kind; but we are not concerned with that. If an oversea company wants to do business in this country, and to do it properly, there are no difficulties.

This company, by reason of section 1 of the Mortmain and Charitable Uses Act, 1888, was not entitled to succeed in these proceedings. The same applies, as counsel has told us, to the second appeal, and it follows that both appeals should be dismissed, with costs.

DENNING L.J. In order that land should be caught by section 1 of the Act of 1888 it must be assured to a corporation in mortmain, and Mr. Widgery urged before us that these words " in mortmain " must be given their proper effect. But what do they mean? Lord Coke in his work of Commentary upon Littleton (p. 2b) said that " the true cause of the name, and the " meaning thereof, was taken from . . . the statute itself." He then referred to the statute of 7 Edw. 1 and gave the true origin of the phrase: " The lands were said to come to dead hands as " to the lords, for that by alienation in mortmain they " (the lords) " lost wholly their escheats, and in effect their knights-services " for the defence of the realme, wards, marriages, reliefes, and the " like; and therefore was called a dead hand, for that a dead hand "yeeldeth no service." In other words, when land was transferred to a corporation, or in those days to a religious person, it ceased to render its dues and services to the lord from that time forward. It was in the hands of a person who was useless to the lord, indeed, just as useless for rendering services as a dead hand would be. It was, therefore, in a dead hand, in mortmain. All such alienations were by the statute liable to be forfeited to the lord or to the King, as the case might be.

Under those old statutes it was held that a lease for 100 years would be mortmain, but a lease for 99 years was not mortmain (see Viner's Abridgement, vol. 15, at p. 485); and in *Vigers* v. *Dean, etc., of St. Paul's*,[8] Lord Denman, delivering the judgment of the court, said [9]: " . . . we have not been able to find any "authority for the proposition that the Statutes of Mortmain "forbid a corporation to hold that which is not in itself per"petual." But the position is different since the Act of 1888. The definition sections and the whole tenor of the Act show that the grant or assignment to a corporation either of a freehold or of a lease, long or short, is an assurance in mortmain. In order to be valid it requires a licence from the Queen, or else the licence must be dispensed with by statute.

I cannot help observing that in this particular case we have a modern instance of a dead hand. Here is a foreign company which does not establish any business office in England and does not register itself in any way. By so doing it puts itself in a position, if not to defeat its obligations entirely, at least to make it most difficult for its dues to be collected from it. It makes it difficult for the tenant to recover on the landlord's covenants. It makes it difficult for the rating authority to obtain rates, or the housing authority to see that the houses are kept in proper condition, or even for the revenue authorities to obtain their proper taxes. So far as all those matters are concerned, it is like unto a dead hand. We have a modern application of the law of nearly 700 years ago. The transfer to this company is void without a licence from the Queen, and no licence has been granted.

In the old days the forfeiture was not automatic, but under the wording of this statute it is clear that the forfeiture is from "the date of the assurance," so that it operates at once without any entry by the Crown; and the tenant can take advantage of it, because he is liable to the Crown for the rent from that date. I agree, therefore, that the appeal should be dismissed.

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[8] 18 L.J.Q.B. 97.

[9] Ibid. 103.

MORRIS L.J. I agree fully with the two judgments delivered, and I do not feel I can usefully add anything.

Appeals dismissed with costs.

Solicitors: *S. A. Bailey & Co.; R. C. Hines; Cliftons.*

M. M. H.

BOWSKILL *v.* DAWSON AND ANOTHER.
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Somervell, Morris and Romer L.JJ.

[1951 B. No. 1029.]

Fatal Accidents Acts—Damages—Insurance—Payment under group life assurance scheme to personal representatives of deceased—Whether payment to be taken into account in assessing damages—Fatal Accidents (Damages) Act, 1908 (8 *Edw.* 7, *c.* 7), *s.* 1.
Insurance. Pensions Scheme.

By section 1 of the Fatal Accidents (Damages) Act, 1908: "In "assessing damages in any action . . . under the Fatal Accidents "Act, 1846, . . . there shall not be taken into account any sum paid "or payable on the death of the deceased under any contract of "assurance or insurance. . . ."

Trustees, in furtherance of a scheme to benefit dependants of employees who should die whilst in the employment of a company, took out a group life policy on the lives of employees. The policy referred to a trust deed made between the company and the trustees by which the company were to finance the scheme and hold the fund on trust for the personal representatives of deceased employees. The employees who were covered ("the lives assured") included one D., on whose death in a road accident the assurance company in accordance with the provisions of the policy paid a substantial sum of money to the trustees, who paid it to D.'s personal representatives.

In assessing an award of damages to D.'s personal representatives in an action for negligence brought by them under the Fatal Accidents Acts, 1846 to 1908, the trial judge took into account the moneys paid under the policy of assurance and reduced the award accordingly. On appeal:—

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-law.]

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Held that, although D. was not a party to the contract of insurance, his personal representatives had in the circumstances an enforceable right as cestuis que trust to receive payment of the moneys which were therefore "paid or payable on the death of the "deceased under" a "contract of assurance or insurance" within the meaning of section 1 of the Fatal Accidents (Damages) Act, 1908, and accordingly ought not to have been taken into account in assessing the damages payable to D.'s personal representatives.

Smith v. *British European Airways Corporation* [1951] 2 K.B. 893; [1951] 2 T.L.R. 608; [1951] 2 All E.R. 737 distinguished.

The personal representatives should be regarded as beneficiaries under the trust notwithstanding (1) that the trustees were, by the deed, given conclusive authority to adjudicate upon all claims on the fund; and (2) that in certain events the company might terminate its payments to the fund and the trustees might then dissolve the fund.

Decision of Devlin J. reversed.

APPEAL and CROSS-APPEAL from order of Devlin J. dated November 17, 1953.

One Dawson, while riding his motor-bicycle, was killed in a road accident when his machine collided with a motor-car driven by a Dr. Bowskill. Dr. Bowskill brought an action claiming damages for negligence against Dawson's personal representatives who counterclaimed for damages for negligence under the Fatal Accidents Acts, 1846 to 1908.[1] After the issue of the writ Dr. Bowskill died and the action was continued by his personal representatives, the National Provincial Bank. Devlin J. gave judgment for the defendants on the counterclaim and dismissed the action. The case was reported [2] on a point under the Evidence Act, 1938.

At the time of the accident Dawson was employed by Mars Ld. of Slough, and was a participant in a group life insurance policy scheme established by Mars Ld., in 1948, for the benefit of its employees. On the death of Dawson £3,300 was paid to his administrators under the terms of the scheme set out in a deed of trust dated September 6, 1948. Devlin J. in assessing the damages payable to Dawson's personal representatives took into account the sum of £3,300 received by them pursuant to the scheme and reduced the amount of damages awarded accordingly.

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[1] Fatal Accidents (Damages) Act, 1908, s. 1: "In assessing damages "in any action, whether commenced "before or after the passing of this "Act, under the Fatal Accidents "Act, 1846, as amended by any sub"sequent enactment, there shall not "be taken into account any sum paid "or payable on the death of the "deceased under any contract of "assurance or insurance, whether "made before or after the passing "of this Act."

[2] [1954] 1 Q.B. 288; [1953] 2 All E.R. 1393.

The plaintiffs appealed on the question of liability, and the defendants entered a cross-appeal on the question of the accountability of the insurance moneys in awarding damages.

On June 1, 1954, the Court of Appeal affirmed Devlin J.'s decision on the question of liability (which does not call for a report) and proceeded to hear argument on the cross-appeal.

The following facts relevant to this issue are taken from the judgment of Romer L.J.: Under the group life policy which had been effected for the furtherance of the scheme the "person "assured" was described as "Mars Security Ld. being the "trustees of the Mars Life Assurance Fund established by "trust deed," and the "lives assured" were "all eligible "employees in respect of whom forms of application have "been or are hereafter deposited by the proposer (namely, "Mars Security Ld.) with and accepted by" the insurance company. The amount assured was the sum certified from time to time by a director of Mars Ld. to have been calculated in accordance with paragraph 7 of the trust deed and was payable to Mars Security Ld. The terms and conditions of the scheme were prescribed by the trust deed to which the policy referred and which was a deed dated September 6, 1948, and made between Mars Ld. (called "the company") of the one part and Mars Security Ld. ("the trustees") of the other part. The deed recited that the company was desirous of establishing a scheme to provide in manner thereinafter appearing benefit relief or assistance for the widow, child or children or other dependants of any of its male employees who should die whilst in employment by the company before attaining the age of 65 years or who should become totally disabled as therein mentioned; and that the company in pursuance of such desire had agreed to pay from time to time such sums as were thereinafter mentioned to the trustees to hold upon trusts and subject to the powers and provisions thereinafter contained. By clause 1 of the deed "the scheme" was defined as meaning the trusts of the trust deed and the terms and provisions of the insurance policy; the clause also defined "the employees" as meaning or including all male persons employed by the company in a full time capacity who had not reached the age of 65 and who should become and remain "members of the fund" constituted by the deed and in respect of whom the company would be making contributions to the fund as thereinafter provided; and "the fund" was defined as meaning all moneys, insurance policies, investments and property from time to time held by or on account of the trustees upon the trusts of the deed. Clause 2 provided, and the company as settlor thereby declared, that the trustees should stand possessed of the fund upon the trusts and provisions of the scheme thereinafter declared. Clause 3 (*e*), after providing that the trustees should out of the income or capital of the fund pay (inter alia) "the benefits relief "or assistance for the time being chargeable against the fund "and all premiums payable on the said policy," proceeded: "Notwithstanding that no employee or other person shall have "any claims to benefit relief or assistance except out of the fund "and shall not in any case have any claim against the company or "the trustees or any one of them the trustees shall have and be "deemed to have carried out the trusts and provisions of this "scheme and shall have satisfied any and all obligations as to "benefit relief or assistance in the case of any particular member "or his estate or personal representatives if they assign or allocate "to that member or to his estate or personal representatives the "benefits of and all moneys payable under the said policy in "relation to that member." Clause 4 (*a*) empowered the trustees to effect other policies of insurance "for the purposes of "providing or securing payment of any benefit payable" under the scheme. Under clause 6 (*a*) it was provided that the company should "out of its own moneys pay to the trustees a regular con-"tribution in respect of each member at the rate of 3.25 per cent. "of the member's salary provided always that in any case where "such contribution is insufficient to do so it may be increased to "a rate sufficient to assure to the member or to his estate or "personal representatives upon his death whilst in the employ-"ment of the company before attaining age 65 an amount not "less than the salary received by the member over the period of "52 full working weeks immediately preceding the date of death."

So far as relevant, the beneficial trusts of the fund were expressed as follows by clause 7 (*b*): "The capital of the fund "and the income thereof for the time being shall be held by the "trustees upon trust to apply the same at such time or times "subject as hereinafter provided for the following purposes that "is to say (i) to secure to the estate of a member upon his death "while in employment with the company before attaining age 65 "a sum assured calculated on the basis of the table of sum "assured in respect of each £1 of salary or alteration in salary "according to the age on the birthday nearest to the date of "entry to the scheme or alteration in salary as the case may

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" be or a sum assured equal to the member's salary whichever " is the greater. The trustees will insure such sum assured in " accordance with the terms and provisions of the said policy." Clause 8 provided: " Any and all benefits relief or assistance " payable under this scheme upon the death of a member shall be " payable to his personal representatives and the trustees shall " not be required or in any way concerned to inquire into the " distribution thereof." Clause 9 provided for the dissolution of the fund at the expiration of the prescribed period, and it is sufficient to note with regard to this that the fund would be applied to meeting benefits already accrued and to the provision of pensions on attaining 65 for such members as might then be still living. Under clause 11 the trustees might with the consent of the company " but not otherwise alter or modify all or any of " the trusts or provisions of this scheme provided that no such " alteration or modification shall be made as will in the opinion " of the actuary directly and substantially prejudice the rights or " interests of any member his estate or personal representatives " already entitled to benefit at the date of such alteration or modi- " fication as to that benefit or alter the main purpose of the fund " from that of granting benefits relief and assistance to the " dependants of members on the latter's death . . . or permit the " return of any moneys to the company." Finally, it was stipulated by clause 17, that on bankruptcy or alienation of " a " benefit to which the member or his estate or personal repre- " sentatives may become entitled under this trust deed " then such benefit should not be payable.

W. A. Fearnley-Whittingstall Q.C. and *P. M. O'Connor* for the defendants. By virtue of the provisions of section 1 of the Fatal Accidents (Damages) Act, 1908, the sum of £3,300 paid to Dawson's estate under the terms of the scheme ought not to have been taken into account in assessing the damages payable to the defendants, his personal representatives. That section refers to " any " contract of assurance or insurance, and therefore the fact that the deceased was not a party to the contract is immaterial. The present case is distinguishable on its facts from *Smith* v. *British European Airways Corporation.*[3]

Marven Everett Q.C. and *H. Tudor Evans* for the plaintiffs. The Act of 1908 was passed with the object of preventing a tortfeasor from diminishing his liability in damages by reason of the thrift of his victim. The sum in question, however, does not come within the ambit of section 1 of the Act, because in referring to a "contract of assurance or insurance" it was intending to specify a contract into which a person, for the benefit of his estate or his dependants, had entered himself. In the alternative, it is contended that in any event the sum in question was not paid to the deceased's personal representatives under a contract of assurance or insurance but under the provisions of a scheme set up and maintained for the benefit of employees of the company (including the deceased). Under the terms of the trust deed the trustees have very wide powers over the fund. Any sum which is received by a member is not therefore paid under a contract of insurance or assurance, but under the scheme: see in particular clause 3 of the trust deed. Reliance is also placed on the circumstance that this is a non-contributory scheme and therefore the present case comes within the decision in *Smith* v. *British European Airways Corporation.*[4]

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[3] [1951] 2 K.B. 893.

W. A. Fearnley-Whittingstall Q.C. replied.

Cur. adv. vult.

June 30. SOMERVELL L.J. I will ask Morris L.J. to deliver the first judgment.

MORRIS L.J. The Fatal Accidents Act, 1846, provides that if the death of a person is caused by a wrongful act, neglect or default which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, then the person who would have been liable if death had not ensued is liable to an action for damages. The action is for the benefit of certain relations, and section 2 of the Act of 1846 provided that such damages should be "proportioned to the injury "resulting from such death to the parties respectively for whom "and for whose benefit such action may be brought." The effect of this was explained by Lord Wright in his speech in *Davies* v. *Powell Duffryn Associated Collieries Ld.*[1] when he said: "The "damages are to be based on the reasonable expectation of "pecuniary benefit or benefit reducible to money value. In "assessing the damages all circumstances which may be legiti-"mately pleaded in diminution of the damages must be

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[4] [1951] 2 K.B. 893.

[1] [1942] A.C. 601, 611, 612; 58 T.L.R. 240; [1942] 1 All E.R. 657.

"considered. (*Grand Trunk Railway Co. of Canada* v. *Jennings*.[2]) The actual pecuniary loss of each individual entitled "to sue can only be ascertained by balancing, on the one hand, "the loss to him of the future pecuniary benefit, and, on the "other, any pecuniary advantage which from whatever source "comes to him by reason of the death."

Reference may also be usefully made to the decision of this court in *Baker* v. *Dalgleish Steam Shipping Co.*[3] Bankes L.J. in his judgment said[4]: "I cannot myself see why, when assessing "compensation under Lord Campbell's Act, any distinction "should be drawn between an assessment of what is a reasonable expectation of benefit had the deceased person lived, and "what is the reasonable expectation of benefit in consequence "of the deceased person's death. Both must be taken into "consideration in arriving at the real loss." Scrutton L.J. in the course of his judgment said[5]: "The claim is a new right given by "Lord Campbell's Act on new principles, not the transfer of any "existing right of the dead man. The claimant is entitled to "damages proportioned to the injury resulting to her from the "death, and that injury must be pecuniary injury. She is not "entitled to money compensation for mental suffering resulting "from the death or for loss of the deceased's society. She is "entitled to claim on the one hand any pecuniary benefit which "it is reasonably probable she would have received if the deceased "had remained alive: *per* Erle C.J. in *Pym* v. *Great Northern* "*Railway Co.*[6] It is not necessary that she should have a legal "right to have received that benefit from the deceased or should "have actually received any such benefit before the death: *Taff* "*Vale Railway Co.* v. *Jenkins*.[7] It is enough that she had a "reasonable expectation of pecuniary advantage in the future had "the deceased survived, which pecuniary advantage may be a "voluntary contribution from the deceased. On the other hand, "as the question is what is her pecuniary loss by the death, any "pecuniary advantage she has received from the death must be "set off against her probable loss. This is clear if she receives "such advantage as of legal right. Thus a sum received by the "claimant under an accident insurance policy must have been "deducted until the passing of the statute of 1908; in the case "of a sum received under a life policy the premiums the deceased

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[2] (1888) 13 App.Cas. 800, 804; 4 T.L.R. 752.

[3] [1922] 1 K.B. 361; 38 T.L.R. 245.

[4] [1922] 1 K.B. 361, 368.

[5] Ibid. 371.

[6] (1863) 4 B. & S. 396.

[7] [1913] A.C. 1; 29 T.L.R. 19.

"would have had to pay if he lived must have been taken into "account in assessing his probable income, though the sum paid "under the policy need not be deducted: *Grand Trunk Railway* "*Co. of Canada* v. *Jennings*.[8] And where the claimant received "in consequence of the death under a settlement (*Pym* v. *Great* "*Northern Railway Co.*[9]) or under a partnership agreement, "pecuniary benefit from the death, such benefit must be taken "into account. In my view the same principle applies to voluntary benefits conferred in consequence of the death. Just as in "assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be "included to swell the claim, so the probability of voluntary "contribution bestowed in consequence of the death may be used "to reduce the claim by showing what loss the claimant has in "fact sustained by the death. Less weight will be given to voluntary contributions than to those made under legal obligation, "just because they are voluntary. Still less weight will be given "to voluntary contributions in instalments, because they are "obviously terminable; and still less weight if the contributor "announces he will reduce his contribution by the amount of "compensation obtained from a wrongdoer who causes the "death."

The position after 1846 was, therefore, that certain pecuniary advantages resulting from the existence of insurance policies might have to be taken into account. Thus in *Hicks* v. *The Newport, Abergavenny and Hereford Railway Co.*[10] Lord Campbell directed a jury that from the aggregate amount of compensation which they would otherwise be prepared to give there should be a deduction in respect of the amount that the plaintiffs would receive upon a policy that insured the deceased against accidents by railways. But different considerations would apply in the case of policies of life assurance. Lord Campbell in his direction to the jury in *Hicks'* case [10] considered separately the position consequential on there being a life insurance policy. In regard to such policies the position might simply be that as a result of the premature death giving rise to the action under the Fatal Accidents Act a widow might then receive that which she was already destined to receive. In delivering the judgment of the Privy Council in *Grand Trunk Railway Co. of Canada* v. *Jennings* [11] Lord

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[8] 13 App.Cas. 800.

[9] 4 B. & S. 396.

[10] (1857) 4 B. & S. 403n.

[11] 13 App.Cas. 800, 804.

Watson said: " The pecuniary benefit which accrued to the respon-" dent from his premature death, consisted in the accelerated " receipt of a sum of money, the consideration for which had " already been paid by him, out of his earnings. In such a case, " the extent of the benefit may fairly be taken to be represented " by the use or interest of the money during the period of accelera-" tion; and it was upon that footing that Lord Campbell, in *Hicks* " v. *Newport, &c., Railway Co.*[12], suggested to the jury that, in " estimating the widow's loss, the benefit which she derived from " acceleration might be compensated by deducting from their " estimate of the future earnings of the deceased the amount of " the premiums which, if he had lived, he would have had to pay " out of his earnings for the maintenance of the policy." The nature of any benefit or reasonable expectation of benefit which may be suggested as resulting in consequence of a deceased person's death will require to be considered in each particular case. Thus, apart from any statutory provision, a reasonable expectation of receiving a pension, though not receivable as of right, may reduce a claim. (See *Baker* v. *Dalgleish Steam Shipping Co.*[13] and *Johnson* v. *Hill.*[14]) But each situation will require separate consideration. Thus a widow after the death of her husband intestate will take his personal chattels absolutely; but these may consist of articles such as furniture of which the widow would have had the use when her husband was alive in the home and which she will continue to use and in respect of which no deduction falls automatically to be made. (See judgment of Hodson J. in *Bishop* v. *Cunard White Star Co. Ld.*[15]) In *Heatley* v. *Steel Company of Wales Ld.*[16] this court held in a particular case, where a husband had purchased the lease of a house which was the family home, that in an action in respect of his death, he having died intestate, as the widow would require to live with the children in the house exactly as before her husband's death, or if the lease were sold in another house, no deduction fell to be made from the damages in respect thereof.

In 1908 there came what Lord Wright described as a " relaxation." The Act then passed was to amend the law with respect to the assessment of damages under the Fatal Accidents Acts. It provided that " there shall not be taken into account " any sum paid or payable on the death of the deceased under

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[12] 4 B. & S. 403n.

[13] [1922] 1 K.B. 361.

[14] [1945] 2 All E.R. 272; 61 T.L.R. 398.

[15] [1950] P. 240, 248; 66 T.L.R. (Pt. 1) 828; [1950] 2 All E.R. 22.

[16] [1953] 1 W.L.R. 405; [1953] 1 All E.R. 489.

"any contract of assurance or insurance." Lord Wright pointed out that the same principle was extended to pensions under the Widows, Orphans and Old Age Contributory Pensions Acts, 1925 and 1935: and now, by reason of the Law Reform (Personal Injuries) Act, 1948, s. 2 (5) (6), no account is to be taken of a right to benefit which on a death may result under the National Insurance Act, 1946 (as to which see section 80 (1) of the Act of 1946).

The question which now arises is whether account should be taken of the sum of £3,300 which was received by the personal representatives of the late Mr. Dawson as the result of a scheme established by his employers to provide (inter alia) "benefit relief or assistance for the widow child or children or other dependants" of male employees who should die whilst in employment with the company before attaining the age of 65. Under the terms of the deed of trust made September 6, 1948, between Mr. Dawson's employers (Mars Ld.) and certain trustees (Mars Security Ld.) the trustees agreed to carry into effect a policy of group life insurance to cover employees of the employers and to pay the benefits covered by the scheme. "The scheme" was defined to mean (so far as it is material to quote for present purposes) "the trusts of this trust deed and the terms and provisions to be entered into and carried into effect with such (if any) modifications or alterations as may be agreed upon of a draft policy of group life insurance already settled and expressed to be made between The Standard Life Assurance Co. of the one part and the trustees of the other part." The trustees agreed to pay (out of the fund's income or out of capital) the benefits chargeable against the fund. "The fund" was defined to mean and include all moneys, insurance policies, investments and property from time to time held by or on account of the trustees upon the trusts of the trust deed. By paragraph 7 (*b*) of the trust deed it was provided as follows: "The capital of the fund and the income thereof for the time being shall be held by the trustees upon trust to apply the same at such time or times subject as hereinafter provided for the following purposes, that is to say: 1. To secure to the estate of a member upon his death while in employment with the company before attaining age sixty-five a sum assured calculated on the basis of the table of sum assured in respect of each one pound of salary or alteration in salary according to the age on the birthday nearest to the date of entry to the scheme or alteration in salary as the case may be or a sum

" assured equal to the member's salary whichever is the greater " the trustees will insure such sum assured in accordance with " the terms and provisions of the said policy. . . ." The employers financed the scheme and provided the amounts needed to pay the insurance premiums. The trustees made proposal to the Standard Life Assurance Company for a group life assurance policy. A policy was duly issued, the trustees being the " person " assured." The employees who were covered (or the " lives " assured ") were all the eligible employees in respect of whom forms of application were deposited by the trustees with and accepted by the Standard Life Assurance Co. The late Mr. Dawson was one of the " lives assured." After he was killed the assurance company in accordance with the provisions of the policy of assurance paid the sum of £3,300 to the trustees. The trustees then paid that sum to the personal representatives of Mr. Dawson.

Under these circumstances, was the sum which the personal representatives received a sum " paid or payable on the death of " the deceased under any contract of assurance or insurance? " In my judgment it was. It is said that the sum received by the personal representatives was payable under the scheme; and reference is made to paragraph 8 of the deed of trust in which it is provided that " any and all benefits relief or assistance payable under this scheme upon the death of a member shall be " payable to his personal representatives." But, as referred to above, " the scheme " by definition comprehends the trusts of the trust deed and the terms and provisions of the policy of group life insurance; and one of the " benefits " of the scheme is the securing of a sum assured for the estate of a member upon his death while in employment. It is true that the deceased was not a party to the contract of assurance, but it is to be noted that the Act of 1908 refers to " any " contract of assurance or insurance and appears, therefore, to cover and include contracts of assurance or insurance other than those made with the deceased. When it is sought to reduce the damages recoverable by the relations of Mr. Dawson because of the receipt of the sum of £3,300 it can in my judgment be shown that such sum had the attribute or feature of being a sum paid on the death of Mr. Dawson under a contract of assurance. Mr. Dawson was a " life assured " and on his death the Standard Life Assurance Co. were under obligation to pay to the trustees who, in turn, were under obligation to pay to the personal representatives of Mr. Dawson. The sum received by the latter can be labelled and identified and accurately described as a sum paid on the death of Mr. Dawson under a contract of assurance, and Mr. Dawson can be considered to have been a beneficiary under a trust of which Mars Security Ld. were trustees. The facts of the present case make it distinguishable from *Smith* v. *British European Airways Corporation.*[17] It is, I think, only fair to the trial judge to point out that before him counsel for the plaintiffs does not appear to have argued that the sum of £3,300 was to be disregarded. In his judgment he said: "Mr. Everett submits, and I do not think Mr. Fearnley-"Whittingstall argued to the contrary, that on the authority "of *Smith* v. *British European Airways Corporation*, *per* Hil-"bery J.,[18] this sum is to be regarded as part of the deceased's "estate to be set against the financial loss to his dependants "resulting from his death and is not excluded by the Fatal "Accidents Act, 1908." We allowed the point to be taken and argued before us and the relevant documents, of which secondary evidence had been given, to be produced.

In my judgment on the facts of this particular case the sum of £3,300 is shown to be a sum which under the Act of 1908 need not be taken into account. I desire to reserve for future consideration the question whether the application of the Act depends upon there being a right in the estate of a deceased to receive the insurance money. A case might arise where the estate receives, though not as of right, or pursuant to a trust, a sum which can in fact be shown to be a sum which had been paid under a contract of insurance. If such sum were received in any circumstances under which, according to the principles to which I have earlier referred, there would apart from the Act of 1908 have to be an accounting, I desire to say nothing which would exclude the applicability of the Act but to reserve the question open for future decision. I consider, therefore, that the cross-appeal succeeds.

Romer L.J. Section 1 of the Fatal Accidents Act, 1908, is expressed in terms which leave something to the imagination, for in speaking of "any sum paid or payable on the death of the "deceased under any contract of assurance or insurance" it is silent as to the identity both of the payer and of the payee in relation to the policy moneys with which the section is concerned. If the payer is the insurance company and the payee is the other party (or his personal representatives) to the contract, the sum of £3,300 which is in question in the present case would appear to be outside the section, for Mr. Dawson, to whose administrators the sum was paid, was not a party to the contract of insurance under which the liability of the insurance company arose, nor did the administrators receive it from that company but from Mars Security Ld. I think, however, that to interpret the section in this way would result in unduly confining the probable intention of the legislature; and in my opinion it can at least be said that if a sum becomes payable upon death under a contract of insurance and the estate of the deceased man has a right, albeit indirectly, to receive the moneys payable thereunder, then a position exists which is within the section even although the deceased man had not himself been a party to the contract. The width of this proposition, as also its applicability, if correct, to the present case was challenged by the appellants.

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[17] [1951] 2 K.B. 893; [1951] 2 T.L.R. 608; [1951] 2 All E.R. 737.

[18] [1951] 2 K.B. 893, 903.

As to the proposition itself, it was said that section 1, in referring to a "contract of assurance or insurance," was intending to specify a contract into which a man, for the benefit of his estate or dependants, had entered himself. Although this probably would be the position in a considerable number of cases, there is no sufficient reason, so far as I can see, to limit the operation of the section to such cases—more especially, perhaps, where accident policies are taken out by employers for the benefit of their employees under schemes which involve a contribution by the men themselves. But be that as it may, the section does not itself indicate that the deceased men themselves should be parties to the relevant contracts, and indeed, by using the comprehensive phrase "any contract," it rather suggests the contrary. If A, a creditor of B, takes out a single premium policy of insurance on B's life, and upon payment of the debt declares himself a trustee of the policy for B, it appears to me that the sum payable on B's death would be within the section, notwithstanding that he was not a party to the contract under which the money was paid. In my opinion, accordingly, the fact that Mr. Dawson was not a party to the contract of insurance under which the £3,300 was paid does not in itself exclude the operation of the Act.

It was alternatively contended that in any case this sum was not paid to Mr. Dawson's administrators under a contract of assurance but under the provisions of a scheme which was inaugurated and maintained by his employers for the benefit of himself and of his fellow workers. I confess that this contention has caused me some little hesitation and difficulty. Upon one aspect of the matter it is true to say that although the £3,300 in question was undoubtedly paid by the insurance company to Mars Security Ld. under a contract of insurance, namely, the contract which existed between these two corporations, the effect and force of that contract was thereupon exhausted and the subsequent payment of the sum to the defendants by Mars Security Ld. could not have been, and was not, effected by virtue of the insurance contract but by the virtue of the scheme to which I have already referred. If the employees who were within the scheme had no rights under it at all, but merely an expectation of benefit dependent wholly on the volition and goodwill of their employers, it could, I suppose, be contended (and I express no concluded opinion upon the validity of the contention) that such sums as their dependants might receive were mere bonuses, and that the fact that they originated from a policy effected by the employers was merely a fortuitous and irrelevant consideration. If, however, the employees had rights, recognizable at law or in equity, in relation to the moneys which became payable under the scheme, it appears to me that there is no room for any such argument. It accordingly becomes convenient to inquire what rights and interests (if any) were conferred upon such of the employees of Mars Ld. as became participants in the scheme.

[His Lordship referred to the terms of the scheme and continued:] It is true that there are provisions under the deed under which the position of the members, as formulated by the clauses to which I have referred, could be adversely affected or qualified. By clause 3 (*a*) the trustees are given conclusive authority to adjudicate upon all claims on the fund and upon any question or doubt arising on the construction of the trust deed or otherwise relating to the scheme, and by clause 3 (*g*) to decide whether or not any particular member or his estate or personal representatives is entitled to benefit under the deed; and further, it is provided by clause 10 (*b*) that the company may in certain events terminate or reduce or suspend its payments and contributions to the fund, in which case the trustees are either to dissolve the fund or modify the scheme as therein prescribed. Notwithstanding these elements in the scheme, however, it appears to me that for all practical purposes the members may be regarded as beneficiaries under a voluntary trust (albeit a conditionally revocable one), established by Mars Ld. for their benefit. The frequent references in the clauses which I have cited to the "claims" and "rights" and entitlement of the members or their legal personal representatives permit, I think, of no other conclusion. Certain it is that they are the only persons having beneficial interests in the fund, for the company, by the trust deed, deliberately excluded itself from any participation therein, either present or future, and the legal owners of the fund, Mars Security Ld., are bare trustees to serve the purposes of the trust and have no equitable interest in the fund. Whether the benefits under the scheme form part of the employees' contracts of service I am not altogether clear, though I gather from the booklet "Mars Ld. Social Security Plan," to which reference was made during the argument before us, that they do; if so, the legal personal representatives of a deceased member could presumably sue the employers for damages if they withheld payment of the appropriate benefit. But the terms of this booklet seem to me to confirm the impression, which derives from the trust deed itself, that the members are entitled to be regarded as beneficiaries under an executed trust. The booklet was issued by the company and addressed to their employees, and on the first page it is stated that "The trusts established "to operate the various funds referred to in this booklet are "vested in Mars Security Ld." Then, on pages which deal with the life assurance fund, the company inform the employees: "Benefits under the scheme are provided through a life "assurance fund established by trust deed and administered "by 'Mars Security Ld.' The trustees have secured these benefits under a group life assurance policy with the Standard Life "Assurance Company. The assurance policy can be seen by "any member on application to the secretary of the trustees. "The trustees will hold the policy in trust for the benefit of "employees, and their liability for claims thereunder will be "limited to the amount paid by the insurance company corresponding to employees' benefits under the scheme. 1. Benefits. "The following is a summary of the benefits to which you will "be entitled as a member of this scheme: (*a*) Death. If you "die whilst in the company's service at any time up to the last "day of the month in which you attain age 65, your personal "representatives will be paid a lump sum calculated from the "table and notes given in Appendix V based upon your age on "date of entry into the scheme. . . . The scheme has been "arranged in such a way that the lump sum payable as benefit "to your personal representatives in the event of your death is "automatically adjusted in respect of any increases or decreases "in your weekly earnings. . . . We must, however, reserve the "right, in the event of unforeseen circumstances, to discontinue "the scheme upon giving one month's notice or to suspend or "amend it from time to time on any anniversary date (May 3) "without prejudice to the rights of anyone in respect of benefits "already payable."

Having regard, then, to the terms of the trust deed and to the exposition of the employers' intention in their booklet, it is clear, in my opinion, that the members of the fund and their personal representatives had more than mere expectancies, dependent upon the goodwill of the employers, in relation to their life assurance benefits. In my judgment they had rights which the courts would recognize and enforce; and although those rights were conferred upon them by the scheme itself they were such as to entitle them as cestuis que trust to call upon the trustees to perform the trusts of the deed under which they benefited and to seek the intervention of the court if need arose. It follows that if the trustees had upon Mr. Dawson's death refused to claim from the insurance company the amount due under the policy and pay the sum over to the defendants they could have applied to the court (for example, under R.S.C. Ord. 55, r. 3 (e)) for an order upon the trustees to do so. Indeed, it may well be that, had the insurance company refused to pay and the trustees declined to sue, the defendants themselves could have sued the company adding the trustees as defendants to the proceedings. If such, then, was the position of the defendants, they are within the proposition to which I have earlier referred in that they had a right, enforceable in equity, to receive the moneys which became payable on Mr. Dawson's death under the contract of insurance between Mars Security Ld. and the insurance company; and such moneys ought not accordingly, in my judgment, to have been taken into account in assessing the damages payable to the defendants.

On this point, therefore, I am of opinion that the cross-appeal should be allowed. I would only add that Mr. Everett, for the appellant, suggested that the scheme which is in question in the present case is non-contributory so far as the employees are concerned and placed some reliance upon the fact. It would not have affected the conclusion which I have expressed if that had in fact been so, for beneficiaries under a trust are more usually volunteers than not; but in fact it seems to me that the members of the fund did contribute indirectly to the scheme, as appears from the statement of the booklet to which I have already referred that "Every effort will be made to see "that at all times a fair and equitable proportion of the company's sales income is allocated for the benefit of employees "either directly as wages or indirectly as social benefits in return "for their services to the company." From this I gather that a portion of the company's income is (very properly) devoted to the scheme which otherwise might have been applied to paying higher wages.

So far as the appeal itself is concerned, I agree that it fails and I have nothing to add to the reasons which were given by my Lord for dismissing it.

SOMERVELL L.J. I agree with the judgments which have just been delivered.

Cross-appeal allowed.

Solicitors: *E. P. Rugg & Co.; William Easton & Sons.*

VANDYK v. MINISTER OF PENSIONS AND NATIONAL INSURANCE.

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July 15, 16.
Slade J.

National Insurance—Employed person—"Gainfully occupied"—Paralysed person — Cost of getting to work exceeding remuneration — Whether profit the criterion—National Insurance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 1 (2) (*a*).
"*Gainfully occupied.*"

The appellant was incapacitated by paralysis of the lower limbs and left arm after having contracted poliomyelitis. Having been advised by his doctors to pursue a purposeful occupation to aid his recovery, he took up an appointment at a salary of £300 a year plus £75 a year travelling allowance on account of his incapacity. A driver-attendant and a motor-car which he used to convey him to and from his work cost him some £11 a week. The appellant contended that as he made no profit out of his employment he was a non-employed person within section 1 (2) (*c*) of the National Insurance Act, 1946:—

Held that, even though the appellant's expenses exceeded his remuneration so that he was unable to make a profit out of his employment, he was none the less "gainfully occupied" in employment under a contract of service within section 1 (2) (*a*) of the Act of 1946, and therefore an employed person within that section.

In re Arthur Average Association for British, Foreign and Colonial Ships, ex parte Hargrove & Co. (1875) L.R. 10 Ch. 542; *In re Padstow Total Loss and Collision Assurance Association* (1882) 20 Ch.D. 137; and *Greenberg* v. *Cooperstein* [1926] Ch. 657 applied.

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APPEAL by case stated from a determination of the Minister under the National Insurance Act, 1946.

On January 22, 1953, the Chief Insurance Officer, in accordance with the provisions of paragraph (1) of regulation 23 of the National Insurance (Determination of Claims and Questions) Regulations, 1948, on the direction of a deputy insurance commissioner given in accordance with the provisions of paragraph (2) of regulation 23, referred for determination by the Minister the question whether the appellant, Dr. Neville David Vandyk, was an employed or a self-employed person for the purposes of the National Insurance Act, 1946, s. 1 (2),[1] while employed as a research assistant by the London School of Economics. On appeal, the contention of the appellant was not that he was at the material times a self-employed person, but that he was a non-employed person.

The Minister, in accordance with the provisions of regulation 3 (3) of the regulations, appointed Mr. W. H. D. Winder, barrister-at-law, to hold an inquiry into the question and to report thereon. On March 24, 1953, an inquiry was held when evidence was given by the appellant and by an assistant secretary and accountant of the London School of Economics, a Mr. Henry Clifford Scriven. The appellant also made a written submission incorporating part of the evidence which he gave. Mr. Winder made a report to the Minister, who found the following facts to be either admitted or proved: (1) that the appellant had been incapacitated by paralysis of the lower limbs and left arm since 1947 on account of anterior poliomyelitis, and this incapacity had existed at all material times; (2) that in October, 1950, the appellant was awarded the degree of Doctor of Philosophy in Economics by the University of London on the result of studies and research pursued since the onset of his infirmity; (3) that at some date before 1951 the appellant was medically advised that he should pursue a purposeful occupation to aid his recovery; (4) that at some date before October 23, 1950, the appellant gave orders for his private motor-car to be structurally adapted to enable him to get to and from the place where he was to work; (5) that on January 23, 1951, the London School of Economics offered the appellant an appointment as a full-time research assistant; the appellant accepted this offer and on January 23, 1951, he was accordingly appointed, the appointment taking effect from the 30th of that month; (6) that the appellant was academically well qualified for this appointment by virtue of his holding the degree of Doctor of Philosophy in Economics and the degree of Bachelor of Commerce with Honours in the University of London; (7) apart from a period of leave between December 12, 1951, and February 9, 1952, the appellant worked at the school in pursuance of his engagement between January 30, 1951, and August 29, 1952; (8) that during the period from December 12, 1951, to February 9, 1952, the appellant was granted special unpaid leave by the school for the purpose of receiving medical treatment abroad and, in fact, spent that period outside Great Britain while receiving such treatment; (9) that during his engagement (save during his period of leave outside Great Britain) the appellant was paid a salary by the school of £300 per annum plus £75 per annum special travelling allowance on account of his incapacity which prevented his using public transport to and from the school; (10) that from the date of his engagement by the school the appellant employed a driver-attendant at a weekly wage of £7 5s. and incurred weekly expenditure in excess of £3 15s. in the provision of petrol and oil for the garaging, maintenance and insurance of the motor-car which he used for travelling to and from his place of work, there being no alternative means of his so travelling; but that it was inferred by the Minister from Mr. Winder's report that the motor-car was also used for travelling to and from the place of medical treatment and for social purposes, and that of the total expenditure only £250 a year was reasonably attributable to the appellant having undertaken the work of a research assistant at the school, the sum of £250 being made up of £188 10s., being one half of the wages of the driver-attendant and the balance in respect of the estimated expenditure in petrol.

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[1] National Insurance Act, 1946, s. 1: "(2) For the purposes of this "Act, insured persons shall be divided "into the following three classes:— "(a) employed persons, that is to say "persons gainfully occupied in em-"ployment in Great Britain, being "employed under a contract of ser-"vice; (b) self-employed persons, that "is to say persons gainfully occupied "in employment in Great Britain "who are not employed persons; (c) "non-employed persons, that is to "say persons who are not employed "or self-employed persons."

The Minister decided as questions of law (*a*) that the appellant was not gainfully occupied in employment in Great Britain during the period of his unpaid leave, and (*b*) that the appellant while working as a research assistant at the school was gainfully occupied, and that he would none the less have been so occupied while working as a research assistant even if the expenses which were reasonably attributable to the appellant's having undertaken the work of a research assistant, and to his travelling to and from his place of work in this private car with driver-attendant had exceeded the sum of £375 per annum; (c) that the contract between the appellant and the school was a contract of service, and (d) that, during the periods from January 30, 1951, to December 11, 1951, and from February 10, 1952, to August 29, 1952 (that is, the period of employment, omitting the period of unpaid leave spent out of England), the appellant was included in the class of employed persons for the purposes of the National Insurance Act, 1946.

On July 15, 1953, the appellant had required the Minister to state a case, and the matter came before the court in accordance with R.S.C., Ord. 55 (B).

Neil Lawson for the appellant. The question to be determined is whether, during the relevant periods, the appellant was "gainfully occupied in employment" within the meaning of section 1 (2) of the Act of 1946. There is no authority on the meaning of "gainfully occupied" and no definition in the Act. It is submitted that where a person has to spend more in doing his work than he receives in remuneration, he is not "gainfully "occupied" within the section. In using the expression regard must be had to what an applicant is actually earning. In certain cases benefit rights are specifically related to earnings, e.g., sections 20 (5) and 24 (1). Some assistance as to the meaning of the phrase is obtained from the National Insurance (General Benefit) Regulations, 1948 (S.I. 1948, No. 1278). The only definition of "gainfully occupied" is contained in the Personal Injuries (Emergency Provisions) Act, 1939, s. 8. That section emphasizes that, to be gainfully occupied, a person must be wholly or substantially dependent on his work for a livelihood.

That "gain" necessarily connotes the making of a profit, is indicated when one considers cases under the Income Tax Acts on the meaning of "profits or gains." Lord Herschell in *Russell* v. *Town and County Bank* [2] stressed [3] that where one was dealing with profits or gains one must take a balance to see whether a gain resulted. In *Gresham Life Assurance Society* v. *Styles* [4] Lord Herschell said that [5] ". . . profits are ascertained by "setting against the income earned the cost of earning it." Later he said [6]: "When we speak of the profits or gains of a "trader we mean that which he has made by his trading.

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[2] (1888) 13 App.Cas. 418; 4 T.L.R. 500.

[3] 13 App.Cas. 418, 424.

[4] [1892] A.C. 309; 8 T.L.R. 618.

[5] [1892] A.C. 309, 312.

[6] Ibid. 322.

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"Whether there be such a thing as profit or gain can only be "ascertained by setting against the receipts the expenditure or "obligations to which they have given rise."

The meaning of "gain" under the Companies Acts was considered in *Armour* v. *Liverpool Corporation* [7]; and in *Nash* v. *Hollinshead* [8] the expression "for the purpose of gain" in the Factory and Workshop Act, 1878, was considered.

The term "gainfully occupied" should be defined to cover one who is engaged in any trade, business, profession, employment or vocation with hopes and intention of obtaining for himself, directly and personally, financial profits or gains in return for his services and efforts. It is the profit element which makes the occupation gainful. In determining what is profit, one has to consider what one may have to spend in order to earn, see regulation 4 (1) (*a*) of Statutory Instrument 1948, No. 1278. One has to apply the test of what is a reasonable cost of earning income, and if that cost exceeds the remuneration a person cannot be said to be an employed person within the meaning of section 1 (2).

J. P. Ashworth for the Minister. The question is whether the appellant is getting something for his efforts, not whether he is getting anything out of them. The adverb is "gainfully" as opposed to "profitably." Parliament had in mind two classes of persons, those employed and those non-employed, and the criterion is whether the appellant has obtained any financial gain for himself. The Personal Injuries (Emergency Provisions) Act, 1939, is a very special Act and is of no assistance in the present case. The meaning of the expression "gainfully "occupied" must be determined in its context in the Act of 1946, and no useful purpose can be served in considering a definition in another Act: *Macbeth & Co.* v. *Chislett.*[9]

"Earnings" are defined in section 78 (1) of the Act of 1946 as including "any remuneration *or* profit derived from gainful "occupation." "Gain" was referred to by Sir George Jessel M.R. in *In re Arthur Average Association, etc., ex parte Hargrove & Co.*[10] as "acquisition": "Gain is something obtained or "acquired. It is not limited to pecuniary gain. . . . And still "less is it limited to commercial profits."

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[7] [1939] Ch. 422; 55 T.L.R. 397; [1939] 1 All E.R. 363.

[8] [1901] 1 K.B. 700; 17 T.L.R. 352.

[9] [1910] A.C. 220, 222; 26 T.L.R. 268.

[10] (1875) L.R. 10 Ch. 542, 546.

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In *In re Padstow Total Loss and Collision Assurance Association*,[11] a case under the Companies Act, 1862, it is also made clear that the word "gain" is something different from commercial profits. Similarly, in *Greenberg* v. *Cooperstein*,[12] Tomlin J. said that[13] ". . . the 'acquisition of gain' does not necessarily mean the acquisition of commercial profits. It is "sufficient that the association carries on business for the purpose of obtaining payments, and it is not necessary that the "business should result in a commercial profit at the end of "the accounting period."

The fact that the appellant had to employ a chauffeur to get him to his work is immaterial in deciding whether he was gainfully occupied. This is illustrated by a passage from the judgment of Lord Cozens-Hardy M.R. in *Roper* v. *Hussey-Freke*[14] when he said[15]: "The workman must have food and "boots in order to do his work and earn wages. But it cannot "be seriously suggested that the cost of the food and the boots "is a deduction from his wages, it is rather the mode in which "part of his wages is expended." [*Midland Railway* v. *Sharpe*[16] was also referred to.] Prima facie, the appellant, under a contract of service, was an employed person. It could not be an answer to say that his expenses exceeded his remuneration. It is most unlikely that Parliament intended that officials should have to go into the question, de die in diem, whether the insured person was working for profit.

[SLADE J. I cannot see how consideration of the Income Tax Acts can help to resolve this question. Under those Acts, tax is levied on a balance of receipts over expenditure.]

The word "balance" in the Income Tax Acts is enough to dispose of those Acts for the present purpose. By section 1 (2) of the Act of 1946 Parliament was intending to divide insured persons into two main classes—the employed and the non-employed. On the facts, to say that the appellant is not gainfully occupied because he is not making a profit is not looking at the issue correctly. It cannot be said that he was working for nothing. The Minister's finding should be upheld.

Lawson in reply. The Income Tax Acts show that "gain" in its ordinary meaning involves a balance. The test is whether a person is engaged in employment in anticipation of financial

[11] (1882) 20 Ch.D. 137.
[12] [1926] Ch. 657.
[13] Ibid. 663.
[14] [1915] 3 K.B. 222; 31 T.L.R. 507.
[15] [1915] 3 K.B. 222, 226.
[16] [1904] A.C. 349; 20 T.L.R. 546.

gain. The scheme under the Act of 1946 is intended to be administered for the benefit of the insured person. The fact that it may involve administrative difficulties is irrelevant.

SLADE J. stated the facts, said that he proposed to assume in the appellant's favour that the whole of the expenditure relied on by the appellant (i.e., £11 a week) was reasonably and necessarily incurred to enable him to travel from his home to the school and back, and continued: The question which I have to decide is whether in respect of the material period (that is, omitting the period of leave) the Minister was right in law in holding that the appellant (who was clearly employed in Great Britain under a contract of service) was gainfully occupied in that employment under a contract of service.

Mr. Neil Lawson says that the appellant cannot be said to have been gainfully occupied in employment because upon the findings of fact by the Minister it necessarily cost the appellant more money to earn the emoluments which he received than the amount of the emoluments. I assume that it did.

The Minister says that "gainfully occupied in employment" has no reference to whether the occupation results in a profit, that is to say, whether it is a commercial or economic proposition; in substance, he says that one has to look only at the contract of service which provides for the emoluments which the servant is to receive from the master and see whether gain to the servant is provided.

Mr. Neil Lawson, on the contrary, contends that "gainfully "occupied" must imply the striking of a balance. One looks at the emoluments payable under the contract of service, and at the figure which must necessarily be expended in earning them. If the expenses fall short of the receipts by one penny, then, he admits, that for the period when the receipts so fall short the appellant is an "employed person." If, on the other hand, the expenses for any given period exceed by one penny the amount of the emoluments, he contends that the appellant becomes a "non-employed person," but not, of course, a "self-"employed person."

I should make it clear that the word "non-employed" before the word "person" is only nomenclature. It merely refers to what is left after (*a*) and (*b*) have been subtracted from the sum total of insured persons, which, of course, includes nearly everyone who is resident in Great Britain. Therefore the fact that an employed person may be a "non-employed

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"person" cannot be allowed to detract from the value of Mr. Neil Lawson's argument. Under "self-employed persons" fall persons who are "gainfully occupied in employment," but who do not come within category (*a*), that is to say, who are not employed under a contract of service.

Mr. Lawson first conceded—the concession, of course, was in no way binding upon him and I am not certain whether or not he withdrew it—that, for example, a barrister in his early days at the Bar who held himself out as being anxious to practise would be a "self-employed person" within section 1 (2) (*b*) notwithstanding the fact that the receipts from his practice fell short of the expense to which he was put in earning them. Whatever the words "gainfully occupied" mean, I think that they must mean the same in section 1 (2) (*b*) as they mean in section 1 (2) (*a*), and, therefore, I should have thought that those words in section 1 (2) (*a*) would also have to be construed as being independent of what I may call the commercial result of the activities of the insured person.

It seems to me that there are many difficulties in accepting the construction contended for by Mr. Lawson, and I will deal with those before I put my own construction. First, it is obvious that if "gainfully occupied in employment" means striking a balance between the receipts and the expenditure to see which of the two exceeds the other, the position (as Mr. Ashworth put it in argument) might fluctuate de die in diem, that is to say, an insured person would be an "employed "person" whenever the receipts exceeded the expenditure by the smallest amount, and he would automatically cease to be an "employed person" whenever by a like amount the expenditure exceeded the receipts. Secondly, it would postulate some means of ascertaining by what standard or criterion the expenditure which was incurred was to be assessed. In this case I am, of course, assuming that it was all reasonably incurred, but is the test to be reasonableness or must it be not only reasonably, but exclusively, incurred or necessarily incurred, or what is the standard by which the expenditure is to be assessed to see whether or not it ever over-tops the receipts?

Section 78 (1) of the Act of 1946 provides: "'Earnings' "includes any remuneration or profit derived from a gainful "occupation." Section 78 (5) reads: "For the purposes of this "Act, the amount of the person's earnings for any period, and "the rate of a person's remuneration, shall be calculated or "estimated in such manner and on such basis as may be "prescribed." By section 78 (1) "'prescribed' means, unless "the context otherwise requires, prescribed by regulations." The National Insurance (General Benefit) Regulations, 1948 (S.I. 1948, No. 1278), regulation 4 (1), provides: "For the "purpose of section 78 (5) of the Act . . . the following provisions shall apply:—(*a*) The earnings "—and in this case the earnings are material to assess the benefit to be enjoyed by the insured person—" to be taken into account shall be limited to "the net remuneration or profit . . . and, in particular, in so "far as the earnings consist of salary or wages, no account "shall be taken of (i) any sums the deduction of which from "salary or wages is authorized by statute; (ii) the reasonable "expenses, if any, incurred by the person in connexion with "the employment."

I am loth to draw any inference from regulations made in pursuance of a power contained in the statute to make regulations in relation to the construction of the statute itself, because in my view the regulations cannot alter or vary the construction of the Act of Parliament. If they did they would be ultra vires, but in so far as I am allowed to or I can profitably refer to the matter (and I refer to it because it is put forward by Mr. Lawson as throwing some light on the meaning of the words "gainfully occupied") I think that the regulations tend to support the construction that the words "gainfully "occupied" are quite independent of the commercial result of the contract of employment. As I have pointed out, "earnings" are defined in the Act as including "any remuneration or profit derived from a gainful occupation," which makes it necessary first to ascertain what constitutes "a gainful "occupation," and then see what "remuneration or profit" is derived from it. But the fact that the regulations provide for the earnings to be limited to "the net remuneration or profit," or the striking of a balance, tends rather to suggest that the striking of a balance is no part of the fountain-head, that is to say, the gainful occupation from which the earnings are derived. If it were part of the fountain-head, presumably the balance would have been struck before the question of earnings arose. However, I do not in any way base my construction of the relevant words upon that.

What I have to do is to look at section 1 (2) (*a*) and decide what, in the context of that subsection, the words "gainfully "occupied in employment" mean. First, one observes that the words are "gainfully occupied in employment . . . under "a contract of service." If the contract of service were in writing, one would expect to ascertain whether a person was or was not "gainfully occupied" under it by looking at the terms of the written contract. If it were an oral contract of service, once the oral terms had been determined the same principle would apply. Here the appellant is employed at a salary of £300 a year plus a contribution of £75 per annum towards the expenses of travel. I ask myself, does the receipt of those emoluments constitute a gainful occupation? In my judgment it does.

Mr. Ashworth submitted that the question which I ought to ask myself is not, is the employed person getting something *out of* it, but is he getting something *for* it, and that the words "gainfully occupied" are really in contradistinction to a contract of employment in an honorary and unpaid capacity. One then says, if that is the case, why use the words "gainfully "occupied" at all, because a contract of employment usually has a consideration proceeding from the master to the servant and one proceeding from the servant to the master? The consideration which moves from the master to the servant is, of course, in nearly every case some form of pecuniary emolument.

In section 1 (2) (*b*), where the words "gainfully occupied" appear with regard to self-employed persons, ex hypothesi there is no contract of employment. I think that in category (*a*) they mean nothing more than a person who receives something from his master as the fruit of his labour, that is to say, who receives from his master under the contract of employment something by way of remuneration for the services which he is contractually bound to render to the master under the contract of service. Similarly (although this does not come before me for decision, but I have expressed the view that the words must mean the same in both (*a*) and (*b*)) I think that a "self-employed" person is a person who is gainfully occupied in employment otherwise than under a contract of service, that is to say, the question is not to be posed at any particular time, has he in fact received some net profit from his activities as a self-employed person, but does he hold himself out as being anxious to become employed for purpose of gain.

In the written submission which the appellant himself put forward, and which was deemed to be incorporated as part of the evidence before the inquiry, he said that, although there is no definition in the Act or the regulations of "gainfully occupied," "the expression must mean a person who is occupied in a way "which would ordinarily be expected to produce a profit." Then he said: "In the case of an employed person it must "mean a person whose wage or salary less reasonable expenses "would result in a profit to the employee."

I have been referred to cases under the Companies Acts which forbid persons more than twenty in number from carrying on business in partnership for the purpose of gain, and to cases under the Workmen's Compensation Act where the operative word is "earnings." I have also been referred to cases under the Income Tax Acts where the expression used is "profits "or gains." The appellant in his written submission refers to two definitions of "gainfully occupied," the first of which illustrates the danger of relying upon the construction of that phrase in another Act of Parliament without carefully looking to see whether the phrase is defined in the Act itself. The appellant refers to the Personal Injuries (Emergency Provisions) Act, 1939, which by section 8 (1) defines a person gainfully occupied for the purpose of that Act as "a person who is engaged "in any trade, business, profession, office, employment or voca-"tion and is wholly or substantially dependent thereon for a "livelihood, or a person who, though temporarily unemployed, "is normally so engaged and dependent." It is clear that, for the purposes of that Act, the words "gainfully occupied" are in part dependent upon whether the receipts from the occupation are wholly or substantially the means of the person's livelihood. Therefore no assistance can possibly be derived from the definition in that Act.

The other authority to which the appellant referred was the decision of the umpire in a pensions case given on April 2, 1947, where the words "gainful occupation" were defined as "one in "which a person is engaged with the desire, hope and intention "of obtaining for himself directly and personally remuneration or "profit in return for his services or efforts." He said that that definition was quoted, approved and adopted by the commissioner in another decision in January, 1949, in an unemployment benefit case, and, in February, 1949, in a decision in a pensions case. If the words had been "remuneration *and* profit," there might have been some force in the argument. As it is, if I accepted that definition as being accurate for the purpose of the present case, it would put the appellant completely out of court, because undoubtedly he is "engaged with the desire, hope and intention "of obtaining for himself directly and personally" the £300 remuneration payable under the contract of service.

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The only authorities which have been cited to me which I find in any way helpful are those which throw light upon the construction of the two words "gainfully occupied," in the sense of the adverb "gainfully" importing merely some element of gain. Mr. Ashworth referred me to three cases in that connexion: *In re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co.*,[1] in particular to a passage from the judgment of Sir George Jessel M.R.[2]; *In re Padstow Total Loss and Collision Assurance Association*,[3] in particular to a passage in the judgment, again of Sir George Jessel M.R.,[4] and a passage in the judgment of Brett L.J.[5] Lastly, I was referred to *Greenberg* v. *Cooperstein*.[6] That was a case under the Companies Act, 1908, in which it was held that the association in question was rendered illegal by section 1 (2) of the Act because the association which carried on the enterprise before the court was an unregistered association of more than twenty persons who were carrying on a business having for its object the acquisition of gain, "gain" being the operative word. Tomlin J. said[7]: "The "question then is, whether it was carrying on any business, and "if so, whether it was a business having for its object the "acquisition of gain by the association or its individual members. "It has, I think, been laid down that the 'acquisition of gain' "does not necessarily mean the acquisition of a commercial "profit." I underline those words—"It is sufficient that the "association carries on a business for the purpose of obtaining "payments, and it is not necessary that the business should result "in a commercial profit at the end of the accounting period."

Tomlin J. was, I think, there referring to the two earlier cases of *In re Arthur Average Association*[8] and *In re Padstow Total Loss and Collision Assurance Association*.[9] A little later Tomlin J. quoted[10] the words of Brett L.J. in *Shaw* v. *Benson*[11]: "A "society is not within section 4 of the Companies Act, 1862, unless "its business has for its object the 'acquisition of gain.' But the "Thornhill Arms Society lends money at interest; therefore it is "an association carrying on a 'business,' having for its object the "'acquisition of gain.' Perhaps the association itself does not "'gain' any profit by the 'business,' but the individual members

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[1] (1875) L.R. 10 Ch. 542.
[2] Ibid. 546.
[3] (1882) 20 Ch.D. 137.
[4] Ibid. 144, 145.
[5] Ibid. 147, 148.
[6] [1926] Ch. 657.
[7] Ibid. 663.
[8] L.R. 10 Ch. 542.
[9] 20 Ch.D. 137.
[10] [1926] Ch. 657, 664.
[11] (1883) 11 Q.B.D. 563, 570.

"do, and this seems to be sufficient to bring the society within "the prohibition of the section."

In *In re Arthur Average Association*,[12] Sir George Jessel M.R. said [12]: "Now, if you come to the meaning of the word 'gain,' "it means acquisition. It has no other meaning that I am aware "of. Gain is something obtained or acquired. It is not limited "to pecuniary gain. We should have to add the word "'pecuniary' so to limit it. And still less is it limited to "commercial profits. The word used, it must be observed, is not "'gains' but 'gain,' in the singular. Commercial profits, no "doubt, are gain, but I cannot find anything limiting gain simply "to a commercial profit." In other words, every profit is a gain, but every gain is not necessarily a profit.

I have, I hope, considered every argument adduced by the appellant himself. I have certainly considered every argument addressed to me by Mr. Neil Lawson, who, as usual, has said everything which could be said on behalf of his client. I have to construe the words "gainfully occupied" in the context in which they appear in section 1 (2) of the Act of 1946. I hold that the Minister was correct in law in the conclusion to which he came, and that the appellant was an employed person within the meaning of section 1 (2) (*a*) at each of the two material periods, that is to say, the period of his employment by the school, excluding the period during which he was abroad on unpaid leave. In the result the appeal is dismissed.

Appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Solicitor, Ministry of National Insurance.*

J. D. P.

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[12] L.R. 10 Ch. 542, 546.

REGINA *v.* CAMBORNE JUSTICES AND ANOTHER. *Ex parte* PEARCE.

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July 21, 29.

Lord Goddard C.J., Cassels and Slade JJ.

Justices—Bias—Test to be applied—Proceedings under Food and Drugs Act, 1938, *instituted by county council—Clerk to justices member of council but not of appropriate committee—No real likelihood of bias.*

During the hearing before justices of informations under the Food and Drugs Act, 1938, laid against the applicant by a sampling officer on behalf of a county council, the clerk to the justices was sent for by the chairman to advise the justices on a point of law. During the time that he was with them, the justices did not discuss the facts of the case and the clerk, having given his advice, returned to the court. Unknown to the applicant at the hearing, the clerk was at the time a member of the council, but was not a member of the council's health committee before which the proceedings against the applicant had been discussed. The justices convicted the applicant. He applied for an order of certiorari to quash the conviction on the ground that, in the circumstances, a reasonable suspicion of bias might arise:—

Held that, to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. In the present case, the facts did not disclose any real likelihood of bias and the application should be dismissed.

Dictum of Blackburn J. in *Reg.* v. *Rand* (1866) L.R. 1 Q.B. 230, 232, applied.

Per curiam. The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart C.J.'s reminder in *Rex* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259, that it "is of fundamental importance that justice should not only be done, but should manifestly and "undoubtedly be seen to be done" is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done.

APPLICATION for an order of certiorari.

The applicant, Henry Pearce, applied for certiorari to quash two convictions by the Camborne justices on January 26, 1954, for (1) having on December 30, 1953, unlawfully sold to the prejudice of the purchaser an article of food not of the quality demanded, contrary to section 3 of the Food and Drugs Act, 1938, and (2) on the said date having wilfully obstructed one Henry Arthur Rundle, who was then acting in the execution of the said Act, contrary to section 78 thereof.

The grounds of the application were: (*a*) that the informations alleging the offences were laid by Rundle who was a sampling officer under the Act, and were stated by him to be laid for the Cornwall County Council; (*b*) that the prosecutor in respect of each of the alleged offences was Rundle; (*c*) that upon the hearing of the informations Rundle was represented, and the prosecution conducted, by a solicitor in the whole-time employment of the Cornwall County Council; (*d*) that throughout the hearing Mr. Donald Woodroffe Thomas, solicitor, acted as clerk to the justices and was called into their private room for the purpose of advising them, although (unknown to the applicant, or his counsel, or the representatives of his solicitors attending the hearing) he was at the time a councillor member of the council. The applicant alleged that in the premises "a reasonable "suspicion of bias might arise."

The facts, as the court found them, were as follows: On January 27, 1948, the Public Health and Housing Committee (later known as the Health Committee) of the council recommended that the authority of the council should be given to its sampling officers to institute proceedings under the Food and Drugs Act, 1938. On February 24, 1948, the council adopted this recommendation. Since that date each of the council's sampling officers, including Rundle, had from time to time been given authorities under the seal of the council appointing them inspectors and authorized officers of the council under the Food and Drugs Acts and expressly authorizing them to institute, on behalf of the council, proceedings under the Acts before any court of summary jurisdiction. On June 20, 1952, a fresh sealed authority was given to Rundle and the other sampling officers, being an extension of the earlier authorities, and this sealed authority was in force at all material times. This authority empowered the sampling officers to institute proceedings under, inter alia, the Food and Drugs Acts in their own discretion and without seeking any specific authority from the council to do so, and it became the practice for the chief sampling officer to report to the Health Committee the action his subordinates had in fact taken. On January 4, 1954, Rundle laid the two informations against the applicant. On January 19, 1954, the chief sampling officer reported to the Health Committee that such proceedings were pending against the applicant.

On February 23, 1954, the council received and adopted the report of its Health Committee dated January 19, 1954. On April 13, 1954, the chief sampling officer reported to the Health Committee the result of the proceedings against the applicant. On May 11, 1954, the council received and adopted the report of its Health Committee dated April 13, 1954. Mr. Thomas was not present at any of the above-mentioned four meetings and indeed was never a member of the Health Committee or its predecessor, the Public Health and Housing Committee. Rundle laid the two informations in the exercise of his own discretion and upon his own responsibility in pursuance of the power conferred upon him by his sealed authority. Mr. Thomas was appointed clerk to the justices for the East Penwith Division of Cornwall on December 30, 1931. He was elected a member of Cornwall County Council on April 22, 1937. He acted as clerk to the justices during the trial of the applicant upon the informations at the Camborne Magistrates' Court on January 26, 1954. He did not retire with the justices while they were considering their verdict, but was later sent for by the chairman, who requested him to advise the justices upon a point of law. During the short time that he was with them the justices did not discuss the facts of the case at all, and having given his advice on the point of law he returned to court. Some appreciable time later the justices returned and gave their decision. At the hearing the applicant pleaded "Not Guilty." The prosecution was conducted by a solicitor in the full-time employment of the Cornwall County Council. The applicant was represented by counsel, instructed by his solicitors, Messrs. Stephens & Scown of St. Austell. An articled clerk, Mr. Philip Stephens (who was not related to any partner in the firm) attended counsel at the hearing on behalf of that firm. Neither the applicant, nor counsel, nor the articled clerk was aware at that time that the clerk to the justices was a member of the Cornwall County Council though that fact was well known to Mr. William Garfield Scown, the partner in the firm who had the conduct of the applicant's defence.

During the six years from 1948 to 1953 inclusive some 660 prosecutions by the Cornwall County Council were heard and determined by the East Penwith Magistrates' Court at which either Mr. Thomas or the deputy clerk to the justices, Mr. Garfield Uren, acted as clerk to the justices; yet so far as was known no previous objection had ever been made because Mr. Thomas acted as clerk to the justices during the hearing of an information by or on behalf of the Cornwall County Council. There was no allegation that Mr. Thomas attempted in any way improperly to influence the justices in their decision on January 26, 1954.

The applicant having learned, shortly after his conviction, that Mr. Thomas was on January 26, 1954, a member of the Cornwall County Council, consulted his solicitor, took counsel's advice, and then caused the present motion for certiorari to be undertaken. On May 25, 1954, application was made ex parte to a Divisional

Court for leave to apply for the order. The grounds of the application were set out in a statement pursuant to R.S.C., Ord. 59, r. 3 (2). The application was supported by an affidavit of the applicant sworn on May 8, 1954, and by an affidavit of his solicitor, Mr. William Garfield Scown, sworn on May 17, 1954. Mr. Scown's affidavit made no mention of his knowledge that Mr. Thomas was at all material times a member of the Cornwall County Council, but on January 26, 1954, he had good reason to believe that Mr. Thomas was then abroad and that his deputy would be acting as clerk to the justices on that date. When the Divisional Court on May 25, 1954, gave leave to apply for certiorari its members were ignorant of the knowledge possessed by Mr. Scown.

P. Malcolm Wright Q.C. and *S. J. Pedlar* for the applicant. It is not contended that the clerk tried to interfere in any way with the due process of law or that he improperly influenced the bench, but the question is whether, in the circumstances, a reasonable suspicion of bias might not arise. There is no direct authority governing the present case, but the argument is based on certain general principles which have been laid down. In *Rex* v. *Sussex Justices, Ex parte McCarthy*,[1] Lord Hewart C.J. said [2]: "Nothing is to be done which creates even a suspicion "that there has been an improper interference with the course "of justice."

Any reasonable person hearing that someone employed by the county council was acting as clerk in proceedings such as the present would say that it was improper. It puts the clerk in an impossible position.

In *Rex* v. *Essex Justices, Ex parte Perkins*,[3] Swift J. stated [4] that it was essential that justice should be so administered as to satisfy reasonable persons that the tribunal was impartial and unbiassed.

[LORD GODDARD C.J. That case seems a long way from the present, and I think that it goes too far. I would have come to a different decision on the facts.]

In *Frome United Breweries Co.* v. *Bath Justices* [5] Lord Atkinson [6] spoke of the inferences to be drawn by a reasonable man. One must look at the matter broadly and ask whether a reasonable person would assume bias.

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[1] [1924] 1 K.B. 256.

[2] Ibid. 259.

[3] [1927] 2 K.B. 475; 43 T.L.R. 415.

[4] [1927] 2 K.B. 490.

[5] [1926] A.C. 586; 42 T.L.R. 571.

[6] [1926] A.C. 608.

By the Justices of the Peace Act, 1949, s. 3 (1), it is laid down that a justice who is a member of a local authority shall not act as a member of a bench in any proceedings brought by or against the authority. By analogy that rule should apply to the clerk, who is an officer of the tribunal. Section 24 of that Act is also relied on.

It is submitted that a reasonable suspicion of bias existed here and the convictions ought to be quashed.

Sir Reginald Manningham-Buller Q.C., S.-G. and *J. P. Ashworth* appearing as amici curiae. There have been considerable variations in the language used in the authorities on this point. The earlier authorities went too far and the true test is revealed in *Frome United Breweries Co.* v. *Bath Justices*.[7] The correct test was also stated by Avory J. in *Rex* v. *Essex Justices, Ex parte Perkins*,[8] namely, whether or not there might appear to be a reasonable likelihood of bias. In *Rex* v. *Salford Assessment Committee, Ex parte Ogden*,[9] the same test was applied. The decision in *Rex* v. *Justices of County Cork*[10] was in line with the *Frome*,[11] *Salford*[12] and *Essex Justices*[13] cases.

The answer must depend on the facts of each particular case. Here the applicant did not show how the justices were likely to exercise bias. The question is: was there a real likelihood that the clerk would impose his influence on the justices or give them wrong legal advice? If one considers the London County Council, which has some 150 members, it would be a misuse of language to suggest that, if one member, who was a solicitor, acted as clerk, anyone in court in possession of the facts would consider that there was a likelihood of bias. The application of the correct test to the present case would show that there was no bias.

As to the Justices of the Peace Act, 1949, the only disqualifications applying to justices' clerks are contained in section 20 (6), and they are not relevant to the present case. It is significant that Parliament did not apply the same disqualifications to clerks as it did to justices by section 3, and the reason is that the clerks have a special function to perform.

"Real likelihood" of bias means something to which a person in possession of such facts as are readily available to him would take exception to. [*Reg.* v. *Nailsworth Licensing Justices, Ex parte Bird*,[14] was referred to.]

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[7] [1926] A.C. 586; 42 T.L.R. 570.

[8] [1927] 2 K.B. 475, 488.

[9] [1937] 2 K.B. 1; 53 T.L.R. 474; [1937] 2 All E.R. 98.

[10] [1910] 2 I.R. 271.

[11] [1926] A.C. 586.

[12] [1937] 2 K.B. 1.

[13] [1927] 2 K.B. 475.

F. S. Laskey for the justices. The cases on bias stress that it may arise either from pecuniary interest or from some interest which any reasonable person would almost inevitably suspect would result in bias: see *Dimes* v. *Grand Junction Canal (Proprietors)*,[15] *Reg.* v. *Manchester, Sheffield and Lincolnshire Railway Co.*,[16] *Reg.* v. *Rand* [17] and *Reg.* v. *Meyer*.[18] In the present case no reasonable person could suspect that the clerk would be able to influence the justices to cause them to have bias.

Paul Wrightson for the prosecutor, Rundle. The mere fact that justices or their clerks are members of a local authority does not amount to presumed bias in cases in which the local authority is a party: see *Reg.* v. *Cant* [19] and *Rex* v. *Caernarvon Licensing Justices, Ex parte Benson*.[20]

Wright Q.C. replied.

On July 21, 1954, the Divisional Court dismissed the application, but took time to consider its reasons.

Cur. adv. vult.

July 29. SLADE J. read the following judgment of the court in which he stated the facts and continued: The question which this court has to decide is: "What interest in "a judicial or quasi-judicial proceeding does the law regard as "sufficient to incapacitate a person from adjudicating or assisting "in adjudicating on it upon the ground of bias or appearance of "bias?" It is, of course, clear that any direct pecuniary or proprietary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias. What interest short of that will suffice? In the present case it is claimed that a reasonable suspicion of bias is enough.

It is true that there are dicta and passages to be found in judgments which lend some colour to this claim, but the authorities as a whole are almost overwhelming in support of the requirement that, to use the well-known words of Blackburn J. in *Reg.* v. *Rand*,[1] "a real likelihood" of bias must be proved to exist before proceedings will be vitiated on the ground that a person who has taken part or assisted in adjudicating upon them was in law incapacitated by interest from doing so.

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[14] [1953] 1 W.L.R. 1046; [1953] 2 All E.R. 652.

[15] (1852) 3 H.L.C. 759.

[16] (1867) L.R. 2 Q.B. 336.

[17] (1866) L.R. 1 Q.B. 230.

[18] (1875) 1 Q.B.D. 173.

[19] (1842) Car. & M. 521.

[20] [1948] W.N. 505; (1949) 113 J.P. 23.

[1] (1866) L.R. 1 Q.B. 230, 233.

Probably the strongest authority in favour of the contention that mere suspicion, or a reasonable suspicion, of bias will suffice is the following passage from the judgment of Lord Esher M.R. in *Eckersley* v. *Mersey Docks & Harbour Board*[2]: "When the "proposition sought to be established on behalf of the plaintiffs "is examined, it comes to this, that the disputes ought not to be "referred to the engineer because he might be suspected of being "biassed, although in truth he would not be biassed. It is an "attempt to apply the doctrine which is applied to judges, not "merely of the Superior Courts, but to all judges—that, not only "must they be not biassed, but that, even though it be demon"strated that they would not be biassed, they ought not to act as "judges in a matter where the circumstances are such that people "—not necessarily reasonable people, but many people—would "suspect them of being biassed."

In *Rex* v. *Justices of County Cork*[3] Lord O'Brien C.J., after citing the above passage from Lord Esher's judgment, said[4]: "That, in my opinion, goes too far. It makes the mere suspicions "of unreasonable persons a test of bias. I think that the judg"ment was not a considered one, and that Lord Esher made use "of some loose expressions. We decline, on a consideration of "the cases, to go so far as that very eminent judge. There must, "in the words of Blackburn J., be a 'real likelihood' of bias: "*Reg.* v. *Rand.*[5] In *Rex* (*De Vesci*) v. *Justices of Queen's* "*Co.*,[6] I expressed myself as follows: 'By "bias" I understand "'a real likelihood of an operative prejudice, whether conscious "'or unconscious. There must, in my opinion, be reasonable "'evidence to satisfy us that there was a real likelihood of bias. "'I do not think that the mere vague suspicions of whimsical, "'capricious and unreasonable people should be made a standard "'to regulate our action here. It might be a different matter if "'suspicion rested on reasonable grounds—was reasonably "'generated—but certainly mere flimsy, elusive, morbid sus"'picions should not be permitted to form a ground of decision.'"

The "suspicion" test nevertheless derived further support from the following passage from the well-known judgment of Lord Hewart C.J. in *Rex* v. *Sussex Justices, Ex parte McCarthy*[7]: "But while that is so, a long line of cases shows

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[2] [1894] 2 Q.B. 667, 670.
[3] [1910] 2 I.R. 271.
[4] Ibid. 275.
[5] L.R. 1 Q.B. 230, 233.
[6] [1908] 2 I.R. 285, 294.
[7] [1924] 1 K.B. 256, 259.

" that it is not merely of some importance but is of fundamental " importance that justice should not only be done, but should " manifestly and undoubtedly be seen to be done. The question " therefore is not whether in this case the deputy clerk made any " observation or offered any criticism which he might not properly " have made or offered; the question is whether he was so related " to the case in its civil aspect as to be unfit to act as clerk to " the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what " might appear to be done. Nothing is to be done which creates " even a suspicion that there has been an improper interference " with the course of justice."

Two years later, however, in *Frome United Breweries Co.* v. *Bath Justices*,[8] Lord Cave L.C. said[9]: " My Lords, if there is one " principle which forms an integral part of the English law, it is " that every member of a body engaged in a judicial proceeding " must be able to act judicially; and it has been held over and " over again that, if a member of such a body is subject to a bias " (whether financial or other) in favour of or against either " party to the dispute or is in such a position that a bias must be " assumed, he ought not to take part in the decision or even to " sit upon the tribunal. This rule has been asserted, not only " in the case of courts of justice and other judicial tribunals, but " in the case of authorities which, though in no sense to be called " courts, have to act as judges of the rights of others." Later Lord Cave said[10]: " This being so, the justices who are members " of the authority are bound to act judicially and not to sit if " they are subject to that which in *Reg.* v. *Rand*[11] was referred " to by Blackburn J. as a ' real likelihood of bias.' "

In the same case Lord Atkinson, citing in support of his opinion passages from the judgments of Sir A. L. Smith M.R. and Vaughan Williams L.J. in *Rex* v. *Sunderland Justices*,[12] applied the same test; he said[13]: " The Master of the Rolls " said: ' It appears to me that, in cases where the decision " ' of justices is impeached on the ground of a bias such as is " ' suggested in the present case, the decision must really turn " ' on the question of fact, whether there was or was not under " ' the circumstances a real likelihood that there would be a " ' bias on the part of the justices alleged to have been so biassed.

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[8] [1926] A.C. 586; 42 T.L.R. 571.

[9] [1926] A.C. 590.

[10] Ibid. 591.

[11] L.R. 1 Q.B. 230, 232.

[12] [1901] 2 K.B. 357, 373; 17 T.L.R. 551.

[13] [1926] A.C. 586, 607.

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" 'If there is such a likelihood, then it is clearly in accordance " 'with natural justice and common sense that the justices likely " 'to be so biassed should be incapacitated from sitting.' " Lord Atkinson continued [14]: " He then adopts and applies to the facts " the rule laid down by Blackburn J. in *Reg.* v. *Rand*,[15] and " ultimately holds that the appeal should be allowed, and the " rule for a certiorari be made absolute. Vaughan Williams L.J. " puts the test in a forcible and practical form; he said: 'Can " 'it be said here that there was nothing more than a mere possi" 'bility or suspicion that these justices would be biassed? We " 'must judge of this matter as a reasonable man would judge of " 'any matter in the conduct of his own business. Can one doubt " 'that a reasonable man as a matter of business would, under " 'the circumstances of this case, infallibly draw the inference " 'that the justices who had negotiated and brought about this " 'agreement would have a real bias in favour of granting the " 'licence . . .?' "

Lord Sumner [16] and Lord Carson [17] both posed the question whether in the case before them there was such a likelihood of bias as would cause the court to interfere.

Moreover, the third member of the Court of Appeal in the *Sunderland* case,[18] Stirling L.J., said [19]: " The question which " we have to determine is, I apprehend, that stated by " Blackburn J. in delivering the judgment of the Queen's Bench " in *Reg.* v. *Rand*,[20] namely, was there in this case such an " interest on the part of the justices whose decision is impugned " as to create a real likelihood that they would have a bias in " favour of the applicant . . .? "

In *Rex* v. *Essex Justices, Ex parte Perkins*,[21] Avory J. said [22]: " We have here to determine, however, whether or not there " might appear to be a reasonable likelihood of his being biassed." And Swift J. said [23]: " It is essential that justice should be so " administered as to satisfy reasonable persons that the tribunal " is impartial and unbiassed. As Lord Hewart C.J. said in *Rex* " v. *Sussex Justices, Ex parte McCarthy* [24]: 'Nothing is to be " 'done which creates even a suspicion that there has been an " 'improper interference with the course of justice.' Might a

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[14] [1926] A.C. 586, 608.
[15] L.R. 1 Q.B. 230, 232.
[16] [1926] A.C. 586, 615.
[17] Ibid. 618.
[18] [1901] 2 K.B. 357.
[19] Ibid. 373.
[20] L.R. 1 Q.B. 230.
[21] [1927] 2 K.B. 475; 43 T.L.R. 415.
[22] [1927] 2 K.B. 488.
[23] Ibid. 490.
[24] [1924] 1 K.B. 256, 259.

"reasonable man suppose that there had here been such an "interference with the course of justice?"

In *Rex* v. *Salford Assessment Committee, Ex parte Ogden*,[25] Slesser L.J.[26] and Luxmoore J.[27] applied the "reasonable likelihood" test, whilst Greene L.J. dissented only upon the inference to be drawn from the facts.

In *Cottle* v. *Cottle*[28] Sir Boyd Merriman P.[29] asked himself the question whether the party complaining "might reasonably "have formed the impression that Mr. Browning," the chairman of the bench, "could not give the case an unbiassed hearing." Bucknill J. said[30]: "The test which we have to apply is "whether or not a reasonable man, in all the circumstances, "might suppose that there was an improper interference with the "course of justice. . . ."

In the judgment of this court the right test is that prescribed by Blackburn J., namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown. This court is further of opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries.

In the present case, for example, the facts relied on in the applicant's statement under R.S.C., Ord. 59, r. 3 (2), might create a more sinister impression than the full facts as found by this court, all or most of which would have been available to the applicant had he pursued his inquiries upon learning that Mr. Thomas was a member of the Cornwall County Council, and none of these further facts was disputed at the hearing of this motion.

The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart's reminder in the *Sussex Justices* case[31] that it "is of fundamental "importance that justice should not only be done, but should "manifestly and undoubtedly be seen to be done" is being urged as a warrant for quashing convictions or invalidating orders upon

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[25] [1937] 2 K.B. 1; 53 T.L.R. 474; [1937] 2 All E.R. 98.

[26] [1937] 2 K.B. 15.

[27] Ibid. 25.

[28] [1939] W.N. 205; [1939] 2 All E.R. 535.

[29] [1939] 2 All E.R. 541.

[30] Ibid.

[31] [1924] 1 K.B. 256, 259.

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quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done.

In the present case this court is of the opinion that there was no real likelihood of bias and it was for this reason that the court dismissed the application on July 21. Having regard to the importance of the principle involved, the Law Officers have intervened in the argument as amici curiae, and the court is much indebted to the Solicitor-General, and indeed to all the counsel concerned in the case, for the assistance they have been good enough to give it.

Application refused; applicant to pay £15 costs by instalments.

Solicitors: *Jaques & Co. for Stephens & Scown, St. Austell; Burton, Yeates & Hart for Vivian Thomas & Jervis, Penzance; Sharpe, Pritchard & Co. for E. T. Verger, Clerk to Cornwall County Council; Treasury Solicitor.*

J. D. P.

1954
Oct. 13.

Lord Goddard C.J., Lynskey and Parker JJ.

REGINA *v.* LANCASTER QUARTER SESSIONS. *Ex parte* HUYTON-WITH-ROBY URBAN DISTRICT COUNCIL.

Public Health — Appeal — Quarter sessions, to — Jurisdiction—Costs—Refusal by justices to grant costs to successful party—Whether party "aggrieved"—Discretion of justices—Failure to exercise—Whether appealable — Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 300, 301.
Justices—Appeal to quarter sessions.

On an appeal under the Public Health Act, 1936, s. 300, to a court of summary jurisdiction by owners of certain premises, against the requirement of a local authority that the owners should provide a dustbin for the premises, the justices found in favour of the owners but, without calling on counsel or giving their reasons, refused to make an order as to costs. The owners appealed to quarter sessions against this refusal and quarter sessions allowed the appeal. On an application by the local authority for an order of certiorari on the ground that quarter sessions had no jurisdiction to hear an appeal on the question of costs only:—

Held, that the owners, as the successful party, were entitled to ask that their application for costs should be considered by the justices in a judicial manner, and unless the justices, in refusing to grant them, exercised their discretion judicially the owners were persons "aggrieved" by the order within the meaning of section 301 of the Act of 1936 and had a right of appeal to quarter sessions. The justices purported to exercise the discretion without facts justifying their exercise, and, therefore, quarter sessions had jurisdiction and certiorari would be refused.

Rex v. *Surrey Quarter Sessions, Ex parte Lilley* [1951] 2 K.B. 749; [1951] 2 T.L.R. 546; [1951] 2 All E.R. 659 applied.

APPLICATION for an order of certiorari.

In June, 1953, a complaint was made by the tenant of premises at 16, Longview Drive, Huyton, owned by Grace & Co. (Builders) Ld., to the applicants, the Huyton-with-Roby Urban District Council, about a smell in the premises and, following investigation, an informal notice was served on G. H. Edwards & Co., the owners' agents (who, throughout the proceedings were treated as the owners), calling on them to remedy a defective drain and replace a defective dustbin. The drain was remedied, but the dustbin was not replaced. On July 29, 1953, a statutory notice under section 75 of the Public Health Act, 1936, was served on the agents requiring them to provide the dustbin. Following a request by the agents that the notice should be withdrawn on the ground that the requirement should have been made on the tenant instead of the landlord, the applicants sent to the agents a letter pointing out that on the statutory notices served there was a note on the bottom of the notice informing them of their rights and methods of appeal under section 75.

On September 4, 1953, the agents appealed by way of complaint in accordance with section 300 of the Act of 1936,[1] against the requirement to provide the dustbin. On September 29, 1953, after hearing all parties, the justices decided that the tenant and not the landlord should provide the dustbin, and made an order accordingly.

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[1] Public Health Act, 1936, s. 300: "(1) Where any enactment in this "Act provides—(*a*) for an appeal to "a court of summary jurisdiction "against a requirement, refusal or "other decision of a council; or (*b*) "for any matter to be determined by, "or an application in respect of any "matter to be made to, a court of "summary jurisdiction, the procedure shall be by way of complaint "for an order, and the Summary "Jurisdiction Acts shall apply to the "proceedings."

S. 301: "Subject as hereinafter "provided, where a person aggrieved "by any order, determination or "other decision of a court of summary jurisdiction under this Act "is not by any other enactment "authorized to appeal to a court of "quarter sessions, he may appeal to "such a court."

Having announced their decision, they stated, without apparently hearing any argument on the point, that they would make no order as to costs. The agents thereupon gave notice of appeal against the justices' refusal to award them costs. At the hearing of the appeal before the Appeals Committee of the Lancaster Quarter Sessions, counsel for the applicants objected that quarter sessions had no jurisdiction to hear an appeal only against a refusal of costs where the justices had given no reasons for their refusal. That objection was overruled and quarter sessions having reheard the case ordered that the justices' order should be varied by providing for payment by the applicants of the costs of the proceedings before the justices, and allowed the appeal with costs.

The applicants applied for an order of certiorari to quash the order of quarter sessions.

Paul Wrightson for the applicant council. The only appeal to quarter sessions was against the justices' decision not to grant costs. The first question is whether quarter sessions had jurisdiction to entertain the appeal. It is clear that the agents had the right of appeal to the justices under section 300 of the Act of 1936, but the Act gives no right to appeal to quarter sessions on costs. Any such right must come under the Magistrates' Courts Act, 1952, s. 55, and the rules made thereunder: see rule 30 of the Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190). Costs are normally discretionary and the right of appeal on costs can only be by statute. In the present case no such statute exists. The agents were not persons "aggrieved" within section 301 of the Act of 1936, because there must be some infringement of a right or burden.

[PARKER J. This court considered that point in *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow.*[2]]

In any event, whether the agents were aggrieved or not, there was no right of appeal on costs only: *Metropolitan Asylum District* v. *Hill.*[3] In *Becker* v. *Purchase,*[4] if quarter sessions had given no reasons for refusing to make an order for costs, this court would have had no power to interfere, but they gave a reason which was wrong. In the present case the order of quarter sessions should be quashed.

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[2] [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78.

[3] (1881) 6 App.Cas. 193.

[4] [1950] W.N. 466; 66 T.L.R. (Pt. 2) 788; [1950] 2 All E.R. 837.

Basil Nield Q.C. and *G. B. H. Currie* for quarter sessions. The agents were persons "aggrieved" within section 301 of the Act of 1936 and, therefore, they had a right of appeal to quarter sessions: see *In re Reed, Bowen & Co., Ex parte Official Receiver*,[5] in which Lord Esher M.R., adopting a dictum of James L.J. in *Ex parte Sidebotham*,[6] said[7]: "'a "person "' "aggrieved" must be a man against whom a decision has "' been announced which has wrongfully refused him something "' which he had a right to demand.'" The agents were also sufficiently near to the subject-matter to have a status in the case and in this respect *Reg.* v. *London County Keepers of the Peace and Justices*[8] is distinguishable.

Quarter sessions had jurisdiction to entertain an appeal on costs alone: see *Jennings* v. *Kelly*[9] and *Rex* v. *Surrey Quarter Sessions, Ex parte Lilley*.[10] In the latter case, which was also a case under section 301 of the Public Health Act, 1936, the headnote reads: "Where a court, in the exercise of its discretion, "and having power to do so, awards costs against a person, that "person is 'aggrieved' by the order made against him and may "appeal from it."

The discretion as to costs must be exercised judicially: *Lewis* v. *Haverfordwest Rural District Council*.[11] There was no material on which the justices could so exercise their discretion and the agents having been deprived of their right to costs were aggrieved and were entitled to appeal to quarter sessions.

Wrightson in reply. The justices considered the whole of the case before refusing costs. This court should not interfere with the exercise of their discretion. Section 301 is not applicable as this appeal is under the Magistrates' Courts Act, 1952.

LYNSKEY J. stated the facts, and continued: This application for certiorari is made on behalf of the local authority on the ground that the appeals committee of quarter sessions had no jurisdiction to hear the appeal because the owners were not persons aggrieved by the order of the justices. [His Lordship read sections 300 and 301 of the Public Health Act, 1936, and continued:] It is clear from these two sections that appeals under the Act of 1936 should be by way of proceedings under the Summary Jurisdiction Acts; and that those Acts and the rules made thereunder are applicable to those appeals in so far as they can apply. In so far as they do not apply, the second half of section 301 gives a right of appeal to quarter sessions.

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[5] (1887) 19 Q.B.D. 174; 3 T.L.R. 640.

[6] (1879) 14 Ch.D. 458, 465.

[7] 19 Q.B.D. 174, 177.

[8] (1890) 25 Q.B.D. 357; 6 T.L.R. 389.

[9] [1940] A.C. 206; 56 T.L.R. 154; [1939] 4 All E.R. 464.

[10] [1951] 2 K.B. 749; [1951] 2 T.L.R. 546; [1951] 2 All E.R. 659.

[11] [1953] 1 W.L.R. 1486; [1953] 2 All E.R. 1599.

It is said on behalf of the local authority that the owners were not persons aggrieved, because, so it is said, where a person who has been a party to proceedings before the justices has been successful, but is refused his costs, the refusal of costs is not an order which aggrieves him, because it does not affect his rights or property, and before a person can be aggrieved there must be an infringement of some right. It is said that there was no right here to costs and, therefore, a person who is refused his costs in the discretion of the justices cannot be an aggrieved person.

In my view, that is not correct. It is not the way in which the matter was regarded in *Rex* v. *Surrey Quarter Sessions, Ex parte Lilley*.[1] The position seems to me to be this, that a successful appellant before justices from a decision of a local authority has a legal right entitling him to ask for his costs. He is entitled to ask that that application or demand for costs shall be considered by the justices in a judicial manner and, unless in the exercise of that discretion they feel bound, on proper reasons, to refuse costs, he is entitled to them in the ordinary way.

In the present case the question arises whether the justices exercised their discretion at all. If they did, and exercised it judicially, it may very well be that this court would not interfere. But on the information before us, the agents were invited to bring this dispute before the justices, and there has been no evidence that there was any material upon which the justices could exercise their discretion judicially and properly refuse the owners their costs. That being so, if there was no such material, the justices have not exercised their discretion judicially and the owners have been deprived of one of their legal rights. They are persons aggrieved and in those circumstances, in my view, they were entitled to go to quarter sessions to have this question dealt with under the Act.

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[1] [1951] 2 K.B. 749.

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Lynskey J.

The only other point that arises is whether, where a court is given a discretion to act, a superior court can interfere. Normally a superior court would not interfere if there were grounds upon which the court could exercise that discretion, however different the view of the superior court might be; but if justices, without any material, exercise or purport to exercise a discretion when no facts are adduced which would justify that exercise, then it is an appealable matter because the justices have not exercised the discretion which they ought to have exercised and, therefore, they have aggrieved the party before them. In those circumstances, in my view, the quarter sessions had jurisdiction to determine this matter and, having jurisdiction, this court cannot interfere with their decision.

LORD GODDARD C.J. I agree.

PARKER J. I agree.

Order of certiorari refused.

Solicitors: *Sharpe, Pritchard & Co. for H. E. H. Lawton, Huyton; Purchase, Clark & Treadwell for Rollo & Mills-Roberts, Liverpool.*

J. D. P.

TOVEY *v.* TYACK.

[Plaint No. K. 807.]

C. A.

1954
Oct. 4, 5.

Evershed M.R., Hodson and Romer L.JJ.

Landlord and Tenant—Rent restriction—Shared accommodation—Use of kitchen—Gift to one tenant of reversion—Other tenant sharing with landlord when proceedings started—Relevant time—Order for possession—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 8.

In 1948 the defendant agreed to take a tenancy of part of a dwelling-house within the scope of the Rent Restriction Acts on terms which included the right to share the use of the kitchen with the plaintiff, to whom the landlord let the remainder of the house. The plaintiff was the landlord's son, and in 1951 his father by deed of gift granted his interest absolutely to the plaintiff, who subsequently, as landlord, claimed possession of the part of the dwelling-house let to the defendant:—

Held, that the plaintiff was entitled to possession because, at the date when proceedings were begun, the terms on which the

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defendant held the part of the dwelling-house let to her included the right to share the use of the kitchen with the plaintiff, who at that time was her landlord, and that, accordingly, she was not entitled to the protection of section 8 of the Landlord and Tenant (Rent Control) Act, 1949.

Lockwood v. *Lowe* [1954] 2 Q.B. 267; [1954] 1 All E.R. 472 applied.

Littlechild v. *Holt* [1950] 1 K.B. 1; 65 T.L.R. 270; [1949] 1 All E.R. 933 distinguished.

APPEAL from Judge Paton sitting at Bristol County Court.

The plaintiff, William Harold Tovey, in these proceedings claimed as landlord to recover possession from the defendant, Ellen Tyack, of part of a house, No. 13, Meyrick Street, Barton Hill, Bristol. The whole of the house had originally been let to the defendant's father, and on his death his widow had remained in occupation under section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, until her death in 1948. Shortly after her death the defendant agreed with the then landlord, who was the plaintiff's father, to take a tenancy of a part of the house consisting of two rooms and an attic, with the right to share the use of the kitchen with the plaintiff, to whom the landlord was about to let the rest of the house. In December, 1948, the plaintiff went into occupation of the remainder of the house as his father's tenant. On April 30, 1951, his father by a deed of gift granted his interest in the dwelling-house absolutely to his son, the plaintiff, so that he became the landlord of the defendant. On February 4, 1954, the plaintiff served a notice to quit on the defendant, but she remained in the premises and the plaintiff brought proceedings in the county court for possession.

The county court judge held that since at the date when the proceedings were brought the defendant was sharing the use of the kitchen with her landlord, she was not entitled to the protection conferred by section 8 (1) [1] of the Landlord and Tenant (Rent Control) Act, 1949, on which she relied, and he made an order for possession to be given to the plaintiff landlord. The defendant appealed.

J. A. Cox for the defendant tenant. Immediately before the reversion was given by the landlord to his son, the plaintiff, there was no doubt but that the defendant tenant was entitled to the protection afforded by section 8 (1) of the Landlord and Tenant

(Rent Control) Act, 1949.[1] The landlord himself could not have got an order for possession against the tenant, and it is submitted that, applying the principle stated by Lord Goddard C.J. in *Littlechild* v. *Holt*,[2] he could not give his son a better right than he himself had. The defendant is not concerned with the superior title; she is still sharing with the person with whom she agreed to share, and the terms on which she is in possession continue the same as when the agreement was made.

[Evershed M.R. She agreed to share with the plaintiff by name. If the arrangement had been to share with the "tenant "for the time being," the fact that a tenant with whom she had shared had become the landlord might be irrelevant.]

In *Lockwood* v. *Lowe*[3] the tenant agreed to share with a particular individual who was in fact the other tenant: he left, and the court held that the landlord was not entitled to substitute himself as the person with whom the continuing tenant had the right of sharing. It would be curious if, notwithstanding *Lockwood* v. *Lowe*,[3] the landlord could, by giving the reversion to the tenant, enable him to get an order for possession although the landlord could not himself have obtained one. If this is possible it is a serious loophole in the Rent Acts. In *Brown* v. *Draper*[4] Lord Greene M.R. said that there were only two ways in which a tenant could lose the protection of the Acts. The Rent Restriction Acts have undoubtedly applied where there is this sharing arrangement and neither of the two grounds for losing protection is present. *Brown* v. *Draper*[4] was decided before the Act of 1949 came into force, but it was cited with approval in *Boyer* v. *Warbey*.[5] A person who is a protected tenant, and who may even have taken the premises because the Rent Restriction Acts apply to them, cannot be deprived of that protection by the unilateral action of the landlord over whom the tenant has no control. The tenancy of the plaintiff has not merged with the landlord's interest for the purpose of the Rent Restriction Acts. [*Isaacs* v. *Titus* [6] was also referred to.]

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[1] Landlord and Tenant (Rent Control) Act, 1949, s. 8: "(1) Where— "(*a*) a tenant has the exclusive occu"pation of any accommodation (in "this section referred to as 'the "'separate accommodation'), (*b*) the "terms as between the tenant and "his landlord on which he holds the "separate accommodation include the "use of other accommodation (in this "section referred to as 'the shared "'accommodation') in common with "another person or other persons, not "being or including the landlord, "and (*c*) by reason only of the cir"cumstances mentioned in paragraph "(*b*) of this subsection, the separate "accommodation would not apart "from this section be a dwelling"house to which the principal Acts "apply, the separate accommodation "shall be deemed to be a dwelling"house to which those Acts apply. ". . ."

[2] [1950] 1 K.B. 1; 65 T.L.R. 270; [1949] 1 All E.R. 933.

[3] [1954] 2 Q.B. 267; [1954] 1 All E.R. 472.

[4] [1944] K.B. 309; 60 T.L.R. 219; [1944] 1 All E.R. 246.

[5] [1953] 1 Q.B. 234; [1952] 2 T.L.R. 882; [1952] 2 All E.R. 976.

Mark Littman for the plaintiff landlord was not called on.

EVERSHED M.R. In my judgment the decision of Judge Paton was correct. He expressed some sympathy for the defendant, and it may be proper that some sympathy should be felt for anybody who has an order for possession made against him or her. But I do not feel that on any view this case is one of great hardship.

If the accommodation which the defendant was going to take in 1948 from the plaintiff's father included as part of the essential accommodation a right of sharing with someone else, as the law then stood she would not have been a protected tenant. But after this bargain had been made, the Act of 1949 was passed, section 8 of which in certain circumstances gives to what I will call a "sharing tenant" protection under the Rent Restriction Acts which previously such a tenant did not possess.

[His Lordship referred to the facts and emphasized that by the terms of the agreement between the defendant and the plaintiff's father, the defendant was to have the privilege or right of sharing the kitchen with a specific individual and no other individual, namely, the plaintiff. His Lordship then read section 8 (1) of the Landlord and Tenant (Rent Control) Act, 1949, and continued:]

When this action was brought the defendant raised the defence, involving the question which has been debated before us, that the accommodation which she had, that is, the two downstairs rooms with the attic room and the right to share the kitchen with the plaintiff, constituted a dwelling-house to which the Act of 1949 applies; and, if she is right, it is conceded that no such events have happened as would justify the making of an order for possession.

The event which has given rise to the problem is this; on April 30, 1951, the plaintiff's father by an appropriate deed granted absolutely to the plaintiff his, the father's, interest in this dwelling-house, so that beyond a peradventure the plaintiff thereafter became the defendant's landlord quoad the accommodation let to her.

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[6] [1954] 1 W.L.R. 398; [1954] 1 All E.R. 470.

At the date when the arrangement was made between the defendant and the plaintiff's father, section 8 (1) of the Landlord and Tenant (Rent Control) Act, 1949, had not been passed, and I assume that the defendant did not, having regard to this arrangement, then acquire a dwelling-house protected by the Rent Restriction Acts. But if the present proceedings had been started by the plaintiff's father after the coming into operation of the Act of 1949 and before the deed of gift was made it would appear that the defendant would have had a good case. She could have said: "The terms as between me and the land-"lord," that is, the plaintiff's father, "include the use of other "accommodation, namely, the kitchen, in common with some-"body else, not being you, the father, but being in fact your son, "the tenant of the other part of the house." But those are not the circumstances now. The judge held, in my view rightly, that the question had to be determined at the date when the proceedings began. As the judge pointed out, and as Romer L.J. emphasized in his judgment in *Lockwood* v. *Lowe*,[1] the words are: "Where . . . the terms as between the tenant and his "landlord on which he holds the separate accommodation . . ."

It is, indeed, a general conception that the applicability of the Rent Restriction Acts is to be tested at the time when proceedings are begun. I think that section 8 requires one to look at that date and to see what were the terms on which the tenant was then holding the accommodation. The judge has found that she had the right to the exclusive or separate accommodation of three rooms, together with a right of sharing the kitchen with one named person, and no other, namely, the plaintiff. At that date the plaintiff was the landlord. There were no persons other than the landlord with whom she was entitled to share the kitchen. In those circumstances the defendant fails, I think, to show that those words apply to her and, therefore, she fails at the vital date to show that the dwelling-house which she occupied was a dwelling-house protected by the Act of 1949.

Mr. Cox has put his case by way of analogy, basing himself on the principles which he derives from *Littlechild* v. *Holt* [2] and *Lucas* v. *Lineham*.[3] In *Littlechild* v. *Holt* [4] a landlord sought possession of a certain dwelling-house and he was faced with the difficulty that he had acquired the reversion to the tenancy after

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[1] [1954] 2 Q.B. 267; [1954] 1 All E.R. 472.

[2] [1950] 1 K.B. 1; 65 T.L.R. 270; [1949] 1 All E.R. 933.

[3] [1950] 1 K.B. 548; 66 T.L.R. (Pt. 1) 641; [1950] 1 All E.R. 586.

[4] [1950] 1 K.B. 1.

December 6, 1937. I think that I am right in saying that the dwelling-house was not subject to "new control." He was, therefore, faced with the bar which is to be found in Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, by which: "A court shall, for the purposes of section 3 "of this Act, have power to make or give an order or judgment "for the recovery of possession . . . without proof of suitable "alternative accommodation . . . if . . . (*h*) the dwelling-house is "reasonably required by the landlord (not being a landlord who "has become landlord by purchasing the dwelling-house or any "interest therein . . ." after the date I have mentioned. He, being himself faced with that statutory bar, died during the pendency of the action. The widow, who was also his universal devisee and legatee, wished to carry on the proceedings. Her case was that she was free of that limiting bar as she was not a landlord who had become landlord by purchasing the dwelling-house: she had become such by virtue of the will of her late husband. This court, however, held that a person in the position of the widow proceeding with that action was not, and could not be treated as being, in any better position than the person from whom she voluntarily derived her title.

Mr. Cox argued before us that since from the date of the coming into operation of the Act of 1949 until the date of the gift by the plaintiff's father, the latter could not have obtained an order for possession, so by making a gift to his son he could not confer upon his son any better right to recover possession than that which he had himself. In my judgment, the analogy is not a true one. This is not a case in which the plaintiff's father was subjected to some special statutory prohibition or bar. The right of the defendant to remain in possession depended upon whether at the relevant date she could prove the existence of certain facts, namely, that she had a right to share accommodation with a person or persons other than the landlord. By the time these proceedings started the plaintiff had in fact become the landlord. He had not been given by his father something which the father had not got, but he was the person with whom, and with whom alone, the defendant had contracted to share the kitchen. By the time the proceedings started he happened to be the landlord and, therefore, the words of section 8 (1) (*b*) of the Act had ceased to protect the defendant's dwelling-house. I think that the considerations to be applied are different from those which were considered in *Littlechild* v. *Holt*,[4] and that no valid analogy can be derived from the judgment in that case. I think that Judge Paton was right in the conclusion at which he arrived, and this appeal, therefore, fails.

Hodson L.J. I agree.

Romer L.J. I also agree.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills for Bobbett Bros., Bristol; Ralph Bond & Rutherford for Veale & Co., Bristol.*

E. D.

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[4] [1950] 1 K.B. 1.

CORDING v. HALSE.

1954
Oct. 20.

Lord Goddard C.J., Lynskey and Ormerod JJ.

Road Traffic — Heavy motor-car — Marking — Convertible lorry — Flat lorry converted to cattle-carrying lorry by addition of container—Unladen weight of lorry without container under three tons—Unladen weight of lorry with container in excess of three tons—"Whether heavy motor-car"—"Alternative body"—Information—Sufficiency—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 2 (1), 26—*Motor Vehicles* (*Construction and Use*) *Regulations*, 1951 (*S.I.* 1951, *No.* 2101), *regs.* 61, 63, 101.

Conflict of Laws—Scottish and English law—Construction of statute—Desirability for uniformity—Road Traffic Acts.

Regulation 61 of the Motor Vehicles (Construction and Use) Regulations, 1951, provides, in the case of a "heavy motor-car," for the marking on it of the unladen weight and maximum permissible speed; regulation 63 (1) provides for the display of a disc bearing the number "20."

The effect of section 2 (1) of the Road Traffic Act, 1930 (as modified), is to exclude from the definition of "heavy motor-cars" and bring within the definition of "motor-cars" vehicles constructed or adapted for use for the conveyance of goods of which the maximum weight unladen does not exceed three tons.

By section 26 of the Road Traffic Act, 1930, ". . . the weight "unladen of any vehicle shall be taken to be the weight of the "vehicle inclusive of the body and all parts (the heavier being "taken where alternative bodies or parts are used) which are neces- "sary to or ordinarily used with the vehicle when working on a "road."

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The defendant owned a motor-lorry which had behind the driver's cab a flat wooden platform suitable for carrying bulky solid loads. To make the lorry suitable for the carriage of cattle a large box-like container was attached to the platform by six wing nuts and bolts. If the lorry was being used for the conveyance of cattle or other animals, the container was necessary to or ordinarily used with the lorry; conversely, when the lorry was used for purposes requiring a flat base the presence of the container was not necessary nor ordinarily used with it. The unladen weight of the lorry without the container was under three tons, but with the container its unladen weight was in excess of three tons. There were no markings on the lorry, nor did it carry a speed limit disc, as required by regulations 61 and 63 of the Motor Vehicles (Construction and Use) Regulations, 1951:—

Held, following *M'Cowan* v. *Stewart*, 1936 S.C. (J.) 36, that the container was not an "alternative body" within the meaning of section 26 of the Road Traffic Act, 1930, and, therefore, the unladen weight of the lorry for the purpose of the regulations was not to be ascertained by reference to the heavier weight when the container was attached; the weight of the lorry without the container being under three tons, it was not a "heavy motor car" to which the regulations applied. Accordingly, on the facts, there was no breach of the regulations.

Observations on the desirability of a uniform construction being placed upon statutes of this nature by both English and Scottish courts.

CASE STATED by Somerset justices sitting at Bridgwater.

Two informations were preferred against the defendant, Reginald Sampson Cording, one for failing to have prescribed markings on a motor-lorry contrary to regulations 61 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951,[1] the

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[1] Motor Vehicles (Construction and Use) Regulations, 1951, reg. 61: "The owner of a heavy motor car "shall cause the unladen weight of "the vehicle and the maximum speed "at which it may be driven when "not drawing a trailer to be painted ". . . on the left or near side of the "vehicle."

Reg. 63: "(1) On every vehicle to "which this regulation applies there "shall be exhibited in a conspicuous "position at the rear . . . a disc" [displaying the number 20]. "(2) "This regulation shall apply to (*a*) "every motor vehicle . . . which is by "virtue of the First Schedule to the "Act restricted . . . to a speed limit "of 20 m.p.h."

Road Traffic Act, 1930, s. 2 (1): "Motor vehicles shall, for the pur-"poses of this Act and the regula-"tions, be divided into the following "classes: . . . (d) Heavy motor cars; "that is to say, mechanically pro-"pelled vehicles . . . constructed "themselves to carry a load or pas-"sengers, and the weight of which "unladen exceeds two tons and a "half."

S. 26: "For the purposes of this "part of this Act, and of any other "enactment relating to the use of "motor vehicles on roads, the weight "unladen of any vehicle shall be "taken to be the weight of the "vehicle inclusive of the body and "all parts (the heavier being taken particulars of the offence being that on November 17, 1953, he, being the owner of a motor-lorry being used on a road did fail to cause the unladen weight of the vehicle and the maximum speed at which it might be driven when not drawing a trailer to be painted or otherwise plainly marked upon some conspicuous place on the left or near side of the vehicle; and the other, for permitting the use of a motor-vehicle not displaying a speed limit disc contrary to regulations 63 and 101.

The following facts were found by the justices: The defendant was the owner of a Commer motor-lorry which, on November 17, 1953, was being used with his authority and permission on a public highway. The motor-lorry, which was constructed or adapted for use only for the conveyance of goods or burden, consisted of a cab for the driver and his mate and a base including a large flat wooden platform extending behind the cab. At the cab end of the platform there was a board extending the width of the platform, to which sideboards could be secured when the vehicle was used as a drop-side vehicle. The platform without the sideboards was suitable for conveying bulky solid loads, such as bags of cement, lime or trusses of hay or straw; with sideboards and tailboard attached it could be used for the conveyance of loose materials such as sand, gravel or coal. All the wheels of the lorry were fitted with pneumatic tyres. At the material time there was attached to the base of the lorry a container, a large wooden box-like article with two sides, two ends, a roof and a floor, which rested on and occupied very nearly the whole of the space of the platform and was attached to it by six wing nuts and bolts. The presence of the container enabled the lorry to be used for carrying cattle, which could not be carried without it or some other form of adequate safeguard. The container was useless for the carriage of cattle or of anything else unless placed on some existing base or platform. If and when the vehicle was being used, or about to be used, or had recently been used for

"where alternative bodies or parts "are used) which are necessary to or "ordinarily used with the vehicle "when working on a road, but exclusive of . . . loose equipment."

Sch. 1: "Limits of Speed. 2 (1) "(*d*) . . . heavy motor cars . . . 20."

Motor Vehicles (Definition of Motor Cars) Regulations, 1941, reg. 2: "The class of motor vehicles defined "as 'motor-cars' in subsection (1) "of section 2 of the Road Traffic "Act, 1930, shall be further sub"divided by the making of two new "sub-divisions as follows . . . "'Vehicles which are constructed or "'adapted for use for the conveyance "'of goods or burden of any descrip"'tion . . . the maximum weight "'unladen does not exceed 3 tons.'"

the conveyance of cattle or animals of any description the container would be necessary to or ordinarily used with the lorry, and conversely, when the lorry was being used for purposes requiring a flat base or low-sided body the presence of the container would not be necessary to nor ordinarily used with it.

The unladen weight of the lorry without the container was in excess of two and a half tons, but under three tons; with the container its unladen weight was in excess of three tons. The road fund licence of the lorry showed the unladen weight to be under three tons. There was not painted or otherwise marked anywhere upon the lorry the unladen weight or the maximum speed at which it might be driven, nor was there exhibited anywhere upon it any disc displaying the number "20." At the material time the lorry was not drawing a trailer.

It was contended on behalf of the defendant that the offences were only committed if at the time of the user the lorry was a "heavy motor-car," and that it was not at the material time a "heavy motor-car"; that the container was not something necessary to or ordinarily used with the lorry when working on a road; that the real issue was whether the container was an alternative body, and that, in itself, it was not a "body" at all, nor, since it was merely something placed on and made fast to the existing body of the motor-lorry and superimposed on it, was it an alternative body.

It was contended on behalf of the prosecutor that the container was a part of the vehicle, and as such fell within the term "all parts" in section 26 of the Road Traffic Act, 1930; that in connexion with the use of the vehicle for the conveyance of cattle its use would be ordinary or necessary when working on a road; that it could not be regarded as loose equipment within the meaning of section 26, but that, if it were not part of the vehicle then in the circumstances it comprised the body of the vehicle or was an alternative body, and that the motor-lorry at the time of the user was a "heavy motor-car."

The justices were of the opinion that the container was an alternative body to the motor-lorry and that when used for carrying cattle or livestock the container as such alternative body was necessary to and ordinarily used with the vehicle within the meaning of section 26. They therefore considered that the weight of the container must be included in the computation of the weight of the vehicle, and that, as the combined weight exceeded three tons, the motor-lorry was a "heavy motor-car." They accordingly convicted the defendant on both charges.

The defendant appealed.

M. A. B. King-Hamilton Q.C. and *John Harington* for the defendant. The container is not an "alternative" body; it is an additional body put on to an already existing one. The words "necessary to or ordinarily used with the vehicle" in section 26 of the Road Traffic Act, 1930, relate to "all parts," not to the body, of a vehicle, and the justices did not find that the container was a "part" necessary to or ordinarily used with the vehicle but a "body."

Section 26 (2) of the Vehicles (Excise) Act, 1949, is relied on; it shows that when Parliament intends the weight of an additional body to be included in the computation of the unladen weight of a vehicle it says so in clear words, and under paragraph (*c*) the weight of a receptacle such as this is not to be taken into account in the assessment of duty. It is submitted that the reason why words similar to those in section 26 (2) of the Vehicles (Excise) Act, 1949, were not used in section 26 of the Road Traffic Act, 1930, is because it was not intended to include in the unladen weight of a vehicle the weight of a container which was merely superimposed on a vehicle. That was the construction put upon section 26 of the Road Traffic Act, 1930, by a full court of seven Lords of Justiciary in *M'Cowan* v. *Stewart.*[2] "Alternative" means the choice of one of two things, the choice of either involving the rejection of the other. This container cannot be used without the base of the lorry, and therefore both bodies are in use at the same time. [Reference was also made to *Mackie* v. *Waugh*[3] and *Lowe* v. *Stone.*[4]]

It is significant that after the Scottish decision in *M'Cowan* v. *Stewart*[5] no such alteration was made to section 26 of the Road Traffic Act, 1930, as was made by section 7 of the Finance Act, 1937, to the Second Schedule of the Finance Act, 1920, which expressly refers to an "additional" body.

Robert Hughes, for the prosecutor, referred to *Lees* v. *Ravenhill*[6] and *Paterson* v. *Burnet.*[7] The Finance Acts are concerned with revenue, but the Road Traffic Act, 1930, is concerned with matters of safety, and the user of the vehicle must be considered.

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[2] 1936 S.C.(J.) 36.

[3] 1940 S.C.(J.) 49.

[4] [1948] 2 All E.R. 1076; [1948] W.N. 487.

[5] 1936 S.C.(J.) 36.

[6] (1924) 94 L.J.K.B. 97; 41 T.L.R. 36.

[7] 1939 S.C.(J.) 12.

The lorry without the container is not in itself a vehicle which can be used for the carriage of cattle, but the base and the container together form a suitable vehicle for that purpose. The base and the container together, therefore, comprise a body which is alternative to the original base. If a body is an "additional" body that does not necessarily mean that it is not also an "alternative" one.

In *Mackie* v. *Waugh*[8] the decision in *M'Cowan* v. *Stewart*,[9] although followed, was doubted. It is open to the court to distinguish *M'Cowan* v. *Stewart*[9] because there the container was fixed to the base with ropes; here it was fixed by mechanical means, thereby forming a new body.

LORD GODDARD C.J. This is a case stated by justices for the petty sessional division of Bridgwater in Somerset, before whom the defendant was summonsed for failing to have prescribed markings on a motor-lorry contrary to regulations 61 and 101 of the Motor-Vehicles (Construction and Use) Regulations, 1951, which provide that a motor-lorry to which the regulations apply shall be marked with the unladen weight and the speed at which it may be driven. Secondly, the defendant was summonsed for permitting the use of a motor-vehicle which did not display by means of a disc a speed limit, contrary to regulation 63. I will say a word at the end of my judgment about the informations in this case, but in substance the case turned entirely upon whether the motor-lorry was a heavy motor-car because, unless it was a heavy motor-car it did not have to bear the markings or the disc. The justices convicted. I can well understand the view which they took, and if I did not think that it was my duty in this case to follow some cases in the Court of Justiciary in Scotland, I should have found as they did.

The case turns almost entirely upon section 26 of the Road Traffic Act, 1930. [His Lordship read section 26, and having referred to the facts found by the justices, continued:] The whole question which the justices had to decide was whether or not they should on those facts find that they must take into account in weighing the vehicle the "heavier" weight ". . . "where alternative bodies" are used. They held that the container was an alternative body and, therefore, took the heavier weight to be the weight of the vehicle for the purpose of the regulations.

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[8] 1940 S.C.(J.) 49.

[9] 1936 S.C.(J.) 36.

When the case was first read, I confess that my mind went in exactly the same way as the justices; I thought, especially because the object of these provisions is for the protection of road-users, that if a lorry is at one time used simply as a flat open lorry such as one sees on the road carrying bricks, and at other times is used to carry cattle, and to make it into a lorry fit to carry cattle a container must be put on to it, altering its whole appearance, that was just the sort of thing that the Act, in referring to alternative bodies, was meant to deal with. The difficulty, however, is this: in 1936, in *M'Cowan* v. *Stewart*,[1] this very point came before the Court of Justiciary. That case is indistinguishable in any material respect from the present, indeed, the only difference was that there the receptacle was fixed to the lorry by means of ropes, and in the present case it was by means of nuts. In that case, which was heard before a full bench of seven Lords of Justiciary, the court by a majority of six to one put a very strict construction on the word "alternative" in section 26, and held that it was not an alterative body merely because something was added to the body; they held, therefore, that there had been no breach of the section because the lorry was being used with the receptacle upon it. There seems to have been one unreported case in England which was referred to by the Lord Justice-General (Lord Normand) in his judgment—*Hodge* v. *Hayton* [2]—but we have not had the advantage of seeing the report. The Lord Justice-General distinguished *Hodge* v. *Hayton*,[2] saying that it was decided as a pure question of fact, but it is very difficult to say that the present case differs in any material respect from *M'Cowan* v. *Stewart*.[3] It is true that in 1940 another case raising the same point, *Mackie* v. *Waugh*,[4] came before the other division of the Court of Justiciary, presided over by the Lord Justice-Clerk (Lord Aitchison), and they held that they were bound by the previous decision, although the three Lords of Justiciary who heard the subsequent case indicated fairly clearly that they did not agree with the decision but felt bound by it.

Meanwhile, Parliament may be said to have taken a hand in this matter because in 1937, the year after *M'Cowan* v. *Stewart* [5] was decided, they included in the Finance Act, 1937, section 7, which amended the Second Schedule to the Finance Act, 1920,

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[1] 1936 S.C.(J.) 36.
[2] November 13, 1924, unreported.
[3] 1936 S.C.(J.) 36.
[4] 1940 S.C.(J.) 49.
[5] 1936 S.C.(J.) 36.

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and they used these words: "For the purpose of paragraph 5 "of the Second Schedule to the Finance Act, 1920, the unladen "weight of a goods vehicle shall be taken to include the weight of "any receptacle, being an additional body, placed on the vehicle "for the purpose of the carriage of goods or burden of any "description, if any goods or burden are loaded into, carried "in and unloaded from the receptacle without the receptacle "being removed from the vehicle." It seems to me that Parliament must have regarded *M'Cowan* v. *Stewart*[5] as rightly decided, or at any rate as a decision with which they were not prepared to interfere, and passed this provision in the Finance Act to make it clear that if a vehicle of that nature was used with a receptacle, it was to bear a higher rate of duty. But that, of course, is an excise provision and is concerned only with the duty and not with the question whether an offence has been committed under section 26 of the Road Traffic Act, 1930.

It is very desirable that with statutes of this nature the same interpretation should be given on either side of the Border. It would be very unfortunate to have, on a similar set of facts, a conviction in England and no conviction in Scotland or vice versa. In this class of case dealing with this class of subject-matter this court always tries to follow the decisions of the Scottish courts if they can, and I think that Scottish courts always pay the same respect to decisions in this country so that one may get uniformity, which is certainly very desirable. I do not mind saying that I think that, if the present case had come before me in 1936 before the decision in *M'Cowan* v. *Stewart*,[5] I should have been very much inclined to take the view which the justices took, but as the Court of Justiciary decided as they did, and as Parliament has obviously, as it seems to me, accepted that decision and for finance purposes has cleared up the matter by using the word "additional" instead of "alternative," I think that we must hold that the facts disclosed in the present case do not amount to an offence against section 26, and for those reasons, with some reluctance, I feel that this appeal must be allowed. It is a matter for the Ministry of Transport to consider whether an alteration of the law is desirable, and if so to ask Parliament for it, but I think that we ought to keep to the decision which I have just indicated.

I only wish to add that in any future case of this nature I hope that more thought and care will be taken with the drafting of the informations. At first it looked as if we should have to refuse to hear this case on the ground that the information disclosed no case. The main information simply said: "Failing "to have prescribed markings on a motor-lorry contrary to regu-"lations 61 and 101 of the Motor Vehicles (Construction and "Use) Regulations." There was no allegation that it was a heavy motor-lorry, which, of course, ought to have been alleged, because it is only a heavy motor-lorry which requires such markings. But the court allowed the case to proceed because no point was taken below, and also because we thought that the reference to the regulations just saved the position. But that is not the way to draft informations because, if the case goes to appeal, the information has to be carefully reproduced in the conviction so that it discloses an offence on the face of it. For the reasons I have given, I think that this appeal must be allowed.

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[5] 1936 S.C.(J.) 36.

LYNSKEY J. I agree.

ORMEROD J. I agree.

Appeal allowed.

Solicitors: *Baileys, Shaw & Gillett for Tozers, Dawlish; Rashleigh & Co. for Alms & Young, Taunton.*

J. F. L.

REGINA v. DAVIES.

C. C. A.
1954
Oct. 25.
Lord Goddard C.J., Lynskey and Ormerod JJ.

Criminal Law — Fraud — Fraudulent conversion — Director of private company charged as director of public company — Meaning of "public company" — "Fraudulent transfer of property, to wit, "an indebtedness"—No offence disclosed—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 20 (1) (*ii*).

Company—Public company—Meaning.

A company incorporated under a public Act is a "public "company" for the purposes of section 20 (1) (ii) of the Larceny Act, 1916, which provides that every person who "being a director, "member or officer of any body corporate or public company fraudu-"lently takes or applies for his own use or benefit . . . any of the

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

"property of such body corporate or public company" shall be guilty of an offence.

The managing director of a company registered under the Companies Act, 1948, as a private company was charged, inter alia, under section 20 (1) (ii) of the Larceny Act, 1916, as a "director "of a certain public company" with fraudulently converting the "property of the public company and applying it to the use of a "finance company":—

Held, that the company of which the appellant was managing director, although a private company, was a public company for the purposes of section 20 (1) (ii) of the Larceny Act since it was incorporated under a public Act, namely, the Companies Act, 1948.

Dicta of Lord Lindley M.R. in *In re Lysaght* [1898] 1 Ch. 115, 122 and of Neville J. in *In re White* [1913] 1 Ch. 231, 238 applied.

A further count of the indictment alleged that the appellant "being a director of a company which subsequently passed a reso-"lution for voluntary winding up, did with intent to defraud "creditors of the company attempt to transfer to himself property "of the said company, to wit, an indebtedness in the sum of "£30,000 then owing by himself to the said company":—

Held, that the cancellation of a debt owed by the appellant to the company was not a transfer of property, and the count was therefore demurrable as it disclosed no offence.

APPEAL against conviction.

The appellant, David Evan Maengwyn Hamilton Davies, a company director, was charged at the Surrey County Assizes on an indictment containing seven counts. The first four counts charged him with obtaining valuable securities, namely, cheques of £8,000 and £12,000, by false pretences, forging and uttering the same. The fifth count charged him with fraudulent conversion of property contrary to section 20 (1) (ii) of the Larceny Act, 1916,[1] namely, that he on or about November 6, 1950, being a director of a certain public company, P. Orchard Ld., unlawfully and fraudulently applied for the use of the Scottish Midland Guarantee Trust Ld. sums of £477 15s. 7d., the property of P. Orchard Ld. The sixth count alleged a similar offence on December 6, 1950.

The facts relating to counts 5 and 6 were as follows: In 1950, the appellant, who was the managing director of P. Orchard

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[1] Larceny Act, 1916, s. 20: "(1) "Every person who—(ii) being a "director, member or officer of any "body corporate or public company, "fraudulently takes or applies for "his own use or benefit, or for any "use or purposes other than the use "or purposes of such body corporate "or public company, any of the "property of such body corporate or "public company . . . shall be guilty "of a misdemeanour. . . ."

Ld., a company registered under the Companies Act, 1948, as a private company, represented to a finance company, the Scottish Midland Guarantee Trust Ld., that he had purchased a number of tractors from the Overseas Food Corporation. He induced the finance company to enter into a hire-purchase agreement with P. Orchard Ld. in order to finance the transaction. No tractors had in fact been bought. The finance company paid to the appellant two cheques for £8,000 and £12,000, which he paid into his own private bank. He subsequently paid two instalments of £477 15s. 7d. due under the hire-purchase agreement to the finance company out of the funds of P. Orchard Ld.

The seventh count of the indictment which related to a separate transaction, the facts of which are not relevant to this appeal, charged the appellant with the attempted transfer of property within the meaning of section 330 (*b*) of the Companies Act, 1948, in that he, on February 13, 1952, being a director of P. Orchard Ld., with intent to defraud the creditors of the company attempted to transfer to himself property of the company, namely, an indebtedness of £30,000 then owing by himself to the company.

At the trial, the commissioner overruled submissions by the defence as to the validity of counts 5, 6 and 7. The appellant was convicted on all seven counts and sentenced to varying periods of imprisonment, to run concurrently, including a sentence of three years' imprisonment for forgery and uttering forged documents; on the other counts he received lesser sentences. Leave to appeal was granted against conviction on counts 5, 6 and 7.

On counts 5 and 6 the appellant contended that the commissioner was wrong in law in rejecting submissions made by the defence (1) that P. Orchard Ld. was not a public company within the meaning of section 20 (1) (ii) of the Larceny Act, 1916, and (2) that the payments made to the hire-purchase company by way of instalments were not and could not be payments to a use other than the use of P. Orchard Ld. The court held that there was no substance in the second ground of appeal.

With regard to count 7, the appellant contended that the commissioner was wrong in law in rejecting the submission that the transaction referred to therein could not have amounted to a transfer of property within the meaning of section 330 of the Companies Act, 1948.

Viscount Hailsham Q.C. and *H. P. B. Dow* for the appellant. A private company is not a public company for the purposes of section 20 (1) (ii) of the Larceny Act, 1916. Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 761, states that any company registered under the Companies Acts, 1862–1948, would be held to be within the provisions of the section, but there is no authority directly on the point. *In re Griffith*,[2] cited in support of the proposition, was a decision under the Apportionment Act, 1870, and is not conclusive. In two further decisions under the Apportionment Act the meaning of a public company was considered for the purposes of that Act. In *In re Lysaght* [3] Lord Lindley M.R. expressed the view [4] that any company registered under the Companies Act, 1862 (then in force) was a public company within the meaning of that expression in the Apportionment Act. In *In re White* [5] Neville J. had to consider for the purposes of the same Act the position of a company incorporated in 1899 under the Companies Act, 1862, which had become a private company under the Companies Act, 1907. He said [6] that in his opinion there was no distinction between private companies and public companies for the purposes of the Apportionment Act, but he came to that conclusion after considering the words of Lord Lindley in *In re Lysaght.*[7] *In re Lysaght* [7] was decided before private companies came into existence. Moreover, Neville J.'s words were obiter, for *In re White* [8] was decided on another point.

The Larceny Act, 1916, was a penal statute passed seven years after private companies were first brought into existence by the Companies Act, 1907. Yet Parliament saw fit to refer in section 20 (1) (ii) specifically to "public companies." It would be wrong for the court to hold, unless driven to do so, that a private company is a public company for the purpose of a penal statute.

It is submitted, further, that the charge in count 7 cannot be sustained. The substantive offence with which the appellant was charged was an attempt to transfer property. That charge cannot be sustained, for all that would have happened, had the transaction been completed, would have been that the appellant's own debt to the company would have been released. The release of a debtor's own debt is not a transfer of property. [Reference was made to Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 1485.]

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[2] (1879) 12 Ch.D. 655.
[3] [1898] 1 Ch. 115.
[4] Ibid. 122.
[5] [1913] 1 Ch. 231.
[6] Ibid. 238.
[7] [1898] 1 Ch. 115, 122.
[8] [1913] 1 Ch. 231.

W. A. L. Raeburn Q.C. and *Mark Littman*, for the Crown, were not called on to argue the first point. As to count 7, the appellant was charged with attempting to transfer an indebtedness. He owed the company £30,000 and he sold to the company £30,000 of worthless shares. In so doing he transferred the indebtedness to himself, thus extinguishing his own debt to the company. That deprived the company of its right to sue him, the debtor. The process of extinguishing a debt, a chose in action, requires, at least notionally, the extinction of the debt, and that, it is submitted, is a transfer of property.

LORD GODDARD C.J. stated the facts and continued: The first point taken on the appellant's behalf is that two counts charged him with offences as a director of a certain public company, namely, P. Orchard Ld.; and the objection is that P. Orchard Ld. is what is known in the Companies Act, 1948, as a private company. The offence charged was fraudulently applying moneys to the use of another company.

The statute under which the appellant was indicted is the Larceny Act, 1916, s. 20, which deals with many sorts of conversion. Subsection (1), paragraph (ii), provides: "Every " person who, being a director, member or officer of any body " corporate or public company, fraudulently takes or applies for " his own use or benefit, or for any use or purposes other than " the use or purposes of such body corporate or public company, " any of the property of such body corporate or public company " . . . shall be guilty of a misdemeanour. . . ."

That has been an offence, at least, a misdemeanour, since 1857. By the Act of 20 & 21 Vict. c. 54, entitled " An Act to make " better provision for the punishment of frauds committed by " trustees, bankers, and other persons intrusted with property," it was provided: (1) " If any person being a trustee of any property " for the benefit, either wholly or partially, of some other person, " or for any public or charitable purpose, shall, with intent to " defraud, convert or appropriate the same or any part thereof " to or for his own use or purposes, or shall, with intent aforesaid, " otherwise dispose of or destroy such property or any part thereof, " he shall be guilty of a misdemeanour." That was reproduced in section 81 of the Larceny Act, 1861, and when that Act was repealed by the Larceny Act, 1916, it reappeared as part of section 20.

It is true that the words "public company" are there used. It is obvious that the legislature was there dealing with two sorts of corporations, a body corporate (by which is meant a chartered company, a statutory company, a body corporate at common law), and a public company, which appears to have been intended to be a company incorporated by some public Act. Any company incorporated under the provisions of the Companies Act is a public company for this purpose, although there may be species of public companies, that is to say, companies incorporated under the Companies Acts, which rank as private companies and have certain rights and privileges.

In *In re Lysaght*,[1] Lord Lindley M.R. said[2]: "I desire to "add one word as to what is a public company. I thought that "the meaning of a public company was settled as long ago as "*Macintyre* v. *Connell*,[3] and I take it that any company "registered under the Companies Act, 1862, is a public company "within the meaning of that expression in the Apportionment "Act." I cannot see why, if it is a public company for the purposes of the Apportionment Act, it is not a public company for the purposes of the Larceny Act. It is true that the Larceny Act is a penal statute, but the cases show that the section is intended to deal with bodies corporate and public companies as contrasted with anything in the nature of a partnership or unincorporated association. "Public company" for this purpose means a company incorporated under the provisions of the Companies Acts, as a private company is. Private companies require just the same protection as any other sort of trading company, for directors of private companies sometimes fail to distinguish between their own property and the property of the company. They may have turned their business into a company for many reasons—sometimes because they want to avoid the risk of bankruptcy. Therefore, anybody who obtains credit, if credit can be obtained, is well advised to get it from the company; and it is thus important that a company should not be deprived of its assets, because it is the company which will have to pay and which can be sued.

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[1] [1898] 1 Ch. 115.

[2] Ibid. 122.

[3] (1851) 1 Sim.N.S. 225.

I have no doubt that we ought to hold that "public company" here means a company incorporated under the Companies Act. In *In re White*,[4] Neville J., no mean authority on matters relating to companies, having cited the passage from Lord Lindley's judgment in *In re Lysaght*,[5] put it in this way[6]: "With that proposition I respectfully agree, but, of course, it "does not decide whether a private company under the Act of "1908 is a public company. I am of opinion, however, that "there is really no such distinction between private companies "and other companies under the Act of 1908 as enables me to "say, with regard to the provisions of the Apportionment Act, "1870, that a particular class of companies are private companies "and other companies are public companies. I think, therefore, "that the Apportionment Act does apply to private companies "under the Act of 1908." Earlier in his judgment he said[6]: "But it seems to me that the use of the words 'private company' "is not conclusive, because I think that phrase is only a "convenient way of referring to a particular class of public "companies for the purposes of the Act."

For the reasons which I have endeavoured to give, it is quite clear in the present case that a company registered as a private company is for the purposes of section 20 (1) (ii) of the Larceny Act, 1916, a public company. It is a company registered under a public Act, of which particulars have to be filed. We should give it the same meaning for the purposes of the Larceny Act as was given in the cases to which I have referred, though they were dealing with another Act.

[His Lordship then referred to the second ground of appeal, and having stated the facts said that in the opinion of the court there was no substance in the point argued, and the appellant had been properly convicted. His Lordship continued:] The last point taken on the appellant's behalf is one which we think is a good point and on which the conviction must be quashed. That is in respect of the seventh count, which charges him that: "on or about February 13, 1952, in the county of Surrey being "an officer, namely a director, of a company named P. Orchard "Ld., which on May 1, 1952, subsequently passed a resolution "for voluntary winding up, did with intent to defraud creditors "of the said company, attempt to transfer to yourself property "of the said company, to wit, an indebtedness in the sum of "£30,000 then owing by yourself to the said company."

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[4] [1913] 1 Ch. 231.

[5] [1898] 1 Ch. 115, 122.

[6] [1913] 1 Ch. 231, 238.

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In the opinion of the court that is clearly a demurrable count and discloses no offence at all because it alleges that he, being indebted to the company, induced the company to transfer their debt to him. It is unnecessary to go through the somewhat technical story which is supposed to justify this count, but assuming that the appellant owed the company £30,000, and by some means, however dishonest or questionable, or even honest, he induced the company to cancel the debt, that is not a transfer of property from the company to him. He was the debtor of the company. The result of the transaction which took place was that the company was induced to record (or might have been induced to record if the offence had gone through) the debt as cancelled. I cannot understand how that is said to be a transfer of property. It is not necessary for us to consider whether it would be possible to frame a charge of an attempt to commit this particular offence, because to make it a transfer of property depends not on the transfer itself but on a condition subsequent to the transfer. However, we need not give any decision on that because we are clearly of opinion that this count was demurrable and therefore the conviction on that count is quashed. To that extent the appeal succeeds.

Appeal allowed in part.

Solicitors: *Ernest W. Long & Co.; Director of Public Prosecutions.*

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Oct. 12,
13, 22.

Lord Goddard C.J., Cassels, Lynskey, Slade and Parker JJ.

JAMES & SON LD. *v.* SMEE.
GREEN *v.* BURNETT AND ANOTHER.

Road Traffic—Defective braking system—Vicarious liability—Defect due to fault of company's servants—Whether company "permitted" the use of vehicle—Mens rea—"User" of vehicle by company—Absolute offence—"Permitted"—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 3 (1)—*Motor Vehicles (Construction and Use) Regulations*, 1951 (*S.I.* 1951, *No.* 2101), *regs.* 75, 101.

Criminal Law—Vicarious liability—Absolute offence—Offence committed by servant—Whether master guilty of "permitting" servant to commit offence—Whether same considerations apply to a limited company as to a private individual.

By regulation 101 of the Motor Vehicles (Construction and Use) Regulations, 1951, "If any person uses or causes or permits to be "used on any road a motor vehicle or trailer in contravention "of or fails to comply with any of the preceding regulations . . . "he shall for each offence be liable to a fine. . . . "

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The prohibition in regulation 101 of user in contravention of regulation 75 is an absolute one in the sense that no mens rea, apart from user, need be shown to constitute the offence; but to "permit" the use in contravention of the regulation imports a state of mind.

Where, therefore, in one case a limited company was charged with "using" a motor-vehicle with a defective braking system contrary to regulations 75 and 101 when the defect in the brakes arose from circumstances over which they had no control; and in another case a limited company were charged with "permitting" a motor-vehicle and trailer to be used with a defective braking system contrary to regulations 75 and 101 when the defect was solely due to the fault of their servants:—

Held that, since a master used his vehicle if it was used by his servant, the company charged with "using" a vehicle in contravention of regulation 75 was guilty of the offence charged; but that (Slade J. dissenting) before a company could be held guilty of permitting a user in contravention of the regulation it must be proved that some person "permitted" as opposed to "committed" the offence, and, there being no evidence of any such permission by a responsible officer of the company, the company charged with "permitting" the use was not guilty of an offence.

Mousell Brothers Ld. v. *London and North Western Railway Co.* [1917] 2 K.B. 836 applied.

Browning v. *J. W. H. Watson (Rochester) Ld.* [1953] 1 W.L.R. 1172; [1953] 2 All E.R. 775 distinguished.

Per Slade J. (dissenting). The word "uses" means in the case of a body corporate "permits to be used," and if the word "uses" creates an absolute prohibition (as I think it does) so also does the expression "permits to be used."

JAMES & SON LD. *v.* SMEE.

CASE STATED by Kent justices sitting at Bromley.

An information was preferred against the defendants, a limited company, for that they on November 10, 1953, did permit to be used on a road a trailer the braking system of which had not been maintained in good and efficient working order and properly adjusted, contrary to regulations 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951.[1]

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[1] Motor Vehicles (Construction and Use) Regulations, 1951, reg. 75: ". . . every part of every braking "system and of the means of operation thereof fitted to a motor vehicle "or trailer . . . shall at all times, "while the motor vehicle or trailer "is used on a road, be maintained "in good and efficient working order "and shall be properly adjusted." Reg. 101: "If any person uses or "causes or permits to be used on any "road a motor vehicle or trailer in "contravention of or fails to comply "with any of the preceding regulations contained in Part III of these "regulations [which includes reg. 75] "he shall for each offence be liable "to a fine not exceeding £20."

The following facts were found by the justices. The defendants were the owners of a trailer, the unladen weight of which exceeded one ton, and which, on November 10, 1953, in High Street, Bromley, was being drawn by a motor-lorry also owned by the defendants and driven by one Cheeseman, their servant. At the time the brake cable of the trailer was not connected to the cable of the drawing vehicle and by reason of that lack of adjustment the trailer brakes, which were operated by means of a lever in the driver's cabin of the lorry, were ineffective. The driver said to the prosecutor "It must have come unhooked." When the lorry with the trailer attached had left the defendants' premises at Malt Street, Camberwell, London, earlier the same day the trailer brake cable was properly adjusted and the brakes were in good order, but subsequently the lorry and trailer had been driven by Cheeseman, accompanied by a trailer boy who was also a servant of the defendants, to Whitbreads Brewery, Chiswell Street, London, where, in order to load the trailer it was necessary to uncouple it from the drawing vehicle and disconnect the brake cable. The trailer was then loaded with grain and the driver relied on his assistant, the trailer boy, to couple the trailer to the drawing vehicle and to connect the brake cable. The boy failed to connect the brake cable properly, and the driver took no steps to check the connexions.

The defendants had put the driver in a position to do certain acts on their behalf, namely: (i) to verify that the brakes of the lorry and trailer were in good and efficient working order and properly adjusted before taking the vehicles on the road; (ii) to be in charge of the trailer boy and the vehicles after they had left the defendants' depot until their return at the end of the day's work; (iii) to collect and deliver grain; (iv) to report any defects in the vehicles to the defendants' maintenance staff; (v) to uncouple and couple the lorry and the trailer when it was necessary to do so for the purpose of loading the trailer.

The defendants had 35 motor-vehicles and 18 trailers and employed a competent staff to remedy all complaints lodged by their drivers regarding vehicles; and all vehicles, including the trailer in question, were examined by a fitter on the Saturday or Sunday prior to November 10, 1953. When the driver returned to the defendants' depot later the same day the brakes of the trailer were then in order and properly adjusted.

It was contended by the defendants that they had taken all proper steps to prevent their driver using the trailer when the brakes were not properly adjusted; that the driver was solely responsible for the vehicle after it had left their premises; that the brake cable of the trailer had been properly adjusted and was not defective when it left their depot and was in order when it returned later the same day; that they could not have known and could not be responsible for the lack of adjustment which occurred after the trailer had left their premises; and that, while agreeing that both the driver and the trailer boy were their servants and that a corporation could only act by its servants or agents, the acts of the driver and/or the trailer boy after they had left the depot were not the acts of the defendants, and those two men were not their servants or agents for the purpose of criminal responsibility in relation to permitting the offence.

The prosecutor did not reply to the defendants' contentions.

The justices were of the opinion that regulations 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951, imposed an absolute prohibition on the use on a road of a trailer the braking system of which had not been maintained in good and efficient working order and properly adjusted; that it having been proved that the defendants were the owners of the trailer the brakes of which did not comply with regulation 75, it thereupon fell to them to prove that they had not permitted its use with the brakes in that condition; that the defendants, being a corporation, could only act by an agent, and the act or omission of any responsible servant of a corporation in contravention of the regulations, if done within the course of his employment, must be deemed to be the act or omission of the corporation; and that the act of the defendants' servant, driver Cheeseman, in allowing a junior servant to attend to the brake connexions without taking steps to verify that they had been properly connected and adjusted was, in the circumstances, a failure by the defendants to take all proper steps to prevent the use of the trailer as alleged in the information.

The justices, accordingly, convicted the defendants. The defendants appealed.

Norman Skelhorn Q.C. and *C. D. Brandreth* for the defendants. There is a distinction between the offence of "using" a vehicle on a road in contravention of the regulations, which is an absolute offence, and that of "permitting" such user. In *Ferguson* v. *Weaving*[2] it was said that there was a "difference

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[2] [1951] 1 K.B. 814, 820; [1951] 1 T.L.R. 465; [1951] 1 All E.R. 412

"between an absolute prohibition and a prohibition against permitting . . ." Before a company can be guilty of permitting the offence of using a motor-vehicle on a road in contravention of the regulations it must be proved that some person for whose criminal act the company was responsible "permitted" as opposed to "committed" the offence within the meaning of the word "permit" in the authorities. "Permitting" requires a mental element, either knowledge, or knowledge of circumstances which would constitute the offence and a failure to take precautions to prevent it, or a closing of the eyes to the obvious and winking at a known practice: *Goldsmith* v. *Deakin*,[3] *Churchill* v. *Norris*[4] and *Prosser* v. *Richings*.[5] It is not enough to say that a servant was negligent, thereby committing an absolute offence.

[CASSELS J. Can the same person be convicted of both using and permitting to be used?]

Where a statute creates the offences of using and of causing or permitting the use, the person who uses cannot be guilty of permitting because he is committing the offence of using. There must be different persons for the purpose of each offence.

[SLADE J. The distinction is only clear in the case of individuals.]

In certain circumstances a failure to take proper steps may amount to permitting, but the mere failure by a servant to take proper steps in a casual act does not automatically mean that the employer permits.

[LORD GODDARD C.J. The prohibition against exceeding the speed limit is absolute. If a driver exceeds the speed limit when driving in the course of his employment by a company, can the company be charged with exceeding the speed limit?]

It is submitted that they could not be. To take another example, if a rear light failed unknown to the driver, it could not seriously be said that a company employing the driver permitted the vehicle to be driven without a rear light.

[LORD GODDARD C.J. This is a case of a casual act of negligence by a servant in the course of a journey. If the test is simply whether or not the servant was driving in the course of his employment it raises rather frightening issues.]

[CASSELS J. It would come to this: that every time a driver takes out a bus the London Transport Board should go with him.]

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[3] (1933) 150 L.T. 157; 50 T.L.R. 73; [1933] W.N. 255.

[4] (1938) 158 L.T. 255.

[5] (1936) 52 T.L.R. 677; [1936] 2 All E.R. 1627; [1936] W.N. 260.

[LORD GODDARD C.J. If I send my chauffeur in my car to deliver a parcel and he exceeds the speed limit, he can be prosecuted. If, in the course of the journey, the brakes fail and he does not stop, am I guilty of an offence?]

[PARKER J. If the obligation is absolute then the employer is liable even though the servant disobeys instructions, providing the servant is acting within the scope of his employment.]

Only if the servant commits an offence to which vicarious responsibility attaches. An absolute prohibition does not necessarily carry with it vicarious responsibility. Whether it does or not depends upon the whole of the terms of the statutory provisions creating the offence.

[LYNSKEY J. referred to *Shave* v. *Rosner*.[6]]

In that case the offence charged was "causing"; here it is that of permitting.

[SLADE J. We have to consider the position of a limited company. If mens rea is necessary the mens rea of an office boy ought not to be imputed to a company, but the question is whether a different result ensues by using different phraseology in an information when the defendant is a company.]

A company is in the same position as an individual. To use, cause or permit are three different offences, with different ingredients.

[LORD GODDARD C.J. If we decide this case on the ground that the company if charged with using would have had no defence, but that they have a defence to the charge of permitting, it simply means that in future companies will be charged with using. We must see whether a company which puts the vehicle on the road in a perfectly proper condition can be charged with an offence committed by their driver.]

Atkin J. in *Mousell Brothers Ld.* v. *London and North Western Railway Co.*[7] said: "Regard must be had to the object "of a statute, the words used, the nature of the duty laid down, "the person upon whom it is imposed, the person by whom it "would in ordinary circumstances be performed, and the person "upon whom the penalty is imposed." That is the test to be applied here, and the words used in the regulation "if any person "uses or causes or permits to be used" do not indicate an intention to create vicarious responsibility. In the *Mousell Brothers Ld.'s* case[8] the forbidden acts were of a kind which would in

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[6] [1954] 2 Q.B. 113; [1954] 2 All E.R. 280.

[7] [1917] 2 K.B. 836, 845.

[8] Ibid.

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most cases be done by a servant; the regulation in this case is concerned with a driver who could equally well be the owner of the vehicle. The regulation creates three different categories, uses, causes and permits, and even though the prohibition against user is absolute it does not attract vicarious responsibility. In *Reynolds* v. *G. H. Austin & Sons Ld.*[9] an omission by a servant was held not to be a failure to take precautions by the company employing him; that case was distinguished in *Browning* v. *J. W. H. Watson* (*Rochester*) *Ld.*,[10] where the company itself failed to take precautions.

[SLADE J. In that case the company were guilty, not because they "permitted" but because they were criminally responsible for the omission of their servant. The basis of the decision was that as the driver had committed the offence in the scope of his employment the company were vicariously responsible.]

It was said that the company should have taken precautions to ensure that no offence would be committed.

[LORD GODDARD C.J. I think *Browning* v. *J. W. H. Watson* (*Rochester*) *Ld.*[11] lays down no more than was laid down in *Goldsmith* v. *Deakin.*[12] If a company in such circumstances knew that unauthorized persons would get into a coach and took no precautions to prevent them, they permitted. Silence gave consent.]

The present case is entirely different. The company had no knowledge, nor was the driver given any "discretion." [Reference was also made to *Griffiths* v. *Studebakers Ld.*[13]; *Houston* v. *Buchanan*[14]; *Provincial Motor Cab Co. Ld.* v. *Dunning*[15]; *Director of Public Prosecutions* v. *Kent and Sussex Contractors Ld.*,[16] and *Rex* v. *I.C.R. Haulage Ld.*[17]]

Paul Wrightson for the prosecutor. To use a vehicle in contravention of the regulation is an absolute offence and no mens rea is required: *Harding* v. *Price.*[18] A company as such cannot drive a vehicle and the act of their driver in the scope of his employment is the act of the company: *Griffiths* v. *Studebakers Ld.*[19] In the case of a company or corporation, therefore, to

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[9] [1951] 2 K.B. 135; [1951] 1 T.L.R. 614; [1951] 1 All E.R. 606.

[10] [1953] 1 W.L.R. 1172; [1953] 2 All E.R. 775.

[11] [1953] 1 W.L.R. 1172.

[12] 150 L.T. 157.

[13] [1924] 1 K.B. 102; 40 T.L.R. 26.

[14] [1940] 2 All E.R. 179 (sub nom. *M'Leod* (*or Houston*) v. *Buchanan*); 1940 S.C.(H.L.) 17.

[15] [1909] 2 K.B. 599; 25 T.L.R. 646.

[16] [1944] K.B. 146; 60 T.L.R. 175; [1944] 1 All E.R. 119.

[17] [1944] K.B. 551; 60 T.L.R. 399; [1944] 1 All E.R. 691.

[18] [1948] 1 K.B. 695; 64 T.L.R. 111; [1948] 1 All E.R. 283.

[19] [1924] 1 K.B. 102.

"permit" imports different considerations than in the case of an individual.

[PARKER J. The first question is who "uses" within the meaning of the regulation.]

The driver uses the vehicle, but a person other than the driver may also do so: *Gifford* v. *Whittaker.*[20]

[PARKER J. It might be that in this context, where the word "uses" is followed by "or causes or permits to be used," the only person who "uses" is the driver. If so, then a limited company cannot use.]

The employer in this case can only act through the servant; if the servant uses, then so, vicariously, does the company. "Permits" in this context does not necessarily mean that a particular servant must permit or condone; but if a servant in the course of his employment by a company does a prohibited act the company must be taken to have permitted. If knowledge is necessary the whole principle of vicarious liability falls to the ground. In *Mousell Brothers Ld.* v. *London and North Western Railway Co.*[21] the offence required an intent to avoid payment. [Reference was also made to *Shave* v. *Rosner*[22] and *Pearks, Gunston & Tee Ld.* v. *Ward.*[23]]

[CASSELS J. The offence in this case is not to permit the use of the vehicle but to permit its use in contravention of the regulation.]

[LORD GODDARD C.J. Was it within the scope of the driver's employment to drive with the brakes in that condition?]

The offence is absolute, so that to permit the use of the vehicle is sufficient. Compare the position in relation to an uninsured vehicle, and compare also *Meadow Dairy Co. Ld.* v. *Cottle.*[24] Permitting the use and causing the use are different stages of the same matter, not different matters. In the case of a company there is no difference between permitting the use and using.

The same argument as that advanced here for the defendants in regard to the employer's knowledge was rejected in *Director of Public Prosecutions* v. *Kent and Sussex Contractors Ld.*,[25] and the principle that an employer is responsible for the criminal act of his servant without knowledge of it extends as far as fraud:

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[20] [1942] 1 K.B. 501; 58 T.L.R. 195; [1942] 1 All E.R. 604.

[21] [1917] 2 K.B. 836.

[22] [1954] 2 Q.B. 113.

[23] [1902] 2 K.B. 1; 18 T.L.R. 538.

[24] [1943] K.B. 199; 59 T.L.R. 72.

[25] [1944] K.B. 146.

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Moore v. *Bresler (I.) Ld.*[26] Lord Wright said in *Houston* v. *Buchanan* [27] that "to permit" included cases "in which permission is merely inferred." The company allowed the driver to use the vehicle and that indicates that he had a discretion to use it in the condition in which he did use it; and having put him in that position, the company cannot be heard to say that they did not permit the vehicle so to be used. See also the remarks of Lord Hewart C.J. in *Prosser* v. *Richings*.[28] *Reynolds* v. *G. H. Austin & Sons Ld.*[29] is distinguishable, for there the prohibited act was done by a third party and, therefore, it was not a case of vicarious responsibility. Here the driver failed to make the necessary inquiries and the case falls within *Browning* v. *J. W. H. Watson (Rochester) Ld.*,[30] which is relied on. If a specific permittor is necessary to constitute the offence, the driver, in failing to make inquiries, was the permittor.

Norman Skelhorn Q.C. in reply. There is no difference between a company and an individual employer for the purposes of this regulation. If the offence is one to which vicarious responsibility attaches it must be shown that some servant or agent acting in the course of his employment committed that which it is alleged was committed by the principal: *Mousell Brothers Ld.* v. *London and North Western Railway Co.*[31] Here it is alleged that the principal permitted; therefore some servant or agent must be proved to have permitted. The driver cannot be said to have permitted himself to use the vehicle in contravention of the regulation; one person cannot at one and the same time use and permit to be used in that context. A servant who commits does not thereby permit on behalf of his employer.

Cur. adv. vult.

GREEN *v.* BURNETT AND ANOTHER.

CASE STATED by Wakefield justices sitting at Lower Agbrigg.

Informations were preferred against the defendants, Charles Thomas Burnett, a motor-van driver, and the Chippeck Bedding Co. Ld., that each of them on November 30, 1953, unlawfully did use on a road a motor-van on which a certain part of the braking system fitted thereto was not maintained in good and efficient working order and properly adjusted contrary to regulations 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951.

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[26] [1944] 2 All E.R. 515.

[27] [1940] 2 All E.R. 179, 187 (sub nom. *M'Leod (or Houston)* v. *Buchanan*).

[28] [1936] 2 All E.R. 1627, 1630.

[29] [1951] 2 K.B. 135.

[30] [1953] 1 W.L.R. 1172.

[31] [1917] 2 K.B. 836.

The following facts were found by the justices. On November 30, 1953, the defendant Burnett was, in the course of his employment by the defendant company, driving a Fordson motor-van on a road when, as a result of the failure of its brakes to operate when an attempt was made to apply them, the motor-van collided with a stationary motor-lorry. The Fordson motor-van was equipped with a vacuum assisted Girling hydraulic braking system and after the collision, although the braking system was undamaged, it was found that the foot pedal could be depressed to its maximum extent without any braking effort being exerted by any of the brake shoes. On dismantling the braking system it was found that a shim washer in the master cylinder, the purpose of which was to protect a rubber recuperating seal from damage by a metal perforated sleeve, was broken into two pieces and that in consequence the rubber recuperating seal, due to its contact with the sleeve, had become perforated, permitting brake fluid to leak through it and so preventing an effective pressure from being exerted by the fluid upon the other parts of the braking system. There were indications that the shim washer had been broken for some time before the collision.

The motor-van had the appearance of having been well maintained in a roadworthy condition and the defendant Burnett, although employed as a driver, had no responsibility as a motor mechanic, but had a general instruction from the defendant company to hand the van over to a firm of automobile engineers whenever he felt that it needed maintenance or whenever any manifest defect in any of its parts indicated that it required examination or repair. The defendant Burnett had complied with his instructions by handing the motor-van over to the firm of automobile engineers on several occasions, the last being two days before the collision, but on that occasion the firm of engineers had not examined the braking system of the van, nor did Burnett then make any complaint to them regarding the condition of the braking system. There was no record of the braking system having at any time been examined or repaired by the firm of engineers, and the broken shim washer and damage to the recuperating seal could have been discovered only by dismantling the master cylinder. When driving the van on the day before the collision, the defendant Burnett had had to "pump" the brake pedal on one occasion in order to cause the necessary braking effort to be exerted, and the necessity to "pump" the pedal indicated some deterioration in the braking system.

It was contended on behalf of the defendants that, inter alia, they had done everything within their power to keep the motor-van well maintained in a roadworthy condition; that a compliance with regulation 75 was assured if the user of a vehicle satisfied the court that he had taken all reasonable steps to have it maintained in a roadworthy condition; that they could have had no knowledge of a defect contained within the casting of the master cylinder and that such knowledge ought not to be imputed to them merely because the driver of the vehicle had had to pump the brake pedal on one occasion.

On the part of the prosecutor it was contended that regulation 75 imposed an absolute duty upon the user of a motor-vehicle on a road so that if any part were allowed to fall into a condition worse than "good and efficient working order" an offence would be committed; and that as Part III of the regulations (containing regulation 75) created offences of an absolute nature, if a person used a motor-vehicle on any road in contravention of the regulations an offence had been committed without proof of mens rea.

The justices were of the opinion that the failure of the brakes was not due to a "failure to maintain," but to the mechanical failure of the shim washer, and that the user of the van by the owner and the driver with the brake in a defective condition arose from circumstances over which they had no control and had not, therefore, contravened the provisions of regulation 75. The justices, accordingly, dismissed both informations.

The prosecutor appealed.

F. P. Neill for the prosecutor. Regulation 75 imposes an absolute duty on the user of the vehicle to maintain the vehicle. "Maintain" means that the vehicle must be kept in the condition in which it was built, or, on the authority of *Galashiels Gas Co. Ld.* v. *O'Donnell or Millar*,[32] it must be kept in a specified condition which, under regulation 75, is a condition of good and efficient working order. As to the word "used" in the regulation, since the regulation imposes an absolute obligation, knowledge is irrelevant: *Shave* v. *Rosner*.[33]

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[32] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.

[33] [1954] 2 Q.B. 113.

[LORD GODDARD C.J. We need not trouble you on that point. It is clear that no mental element is required. This case is very different from *James & Son Ld.* v. *Smee.*]

The defendants did not appear and were not represented.

Cur. adv. vult.

October 22. LORD GODDARD C.J. I will ask Parker J. to read the majority judgment of the court (Lord Goddard C.J., Cassels, Lynskey and Parker JJ.) in *James & Son Ld.* v. *Smee.*

PARKER J. This is an appeal by way of case stated by justices for the county of Kent acting in and for the petty sessional division of Bromley, before whom an information was preferred by the prosecutor against the defendants, a limited company, that they did permit to be used on a road a trailer, the braking system of which had not been maintained in good and efficient working order and properly adjusted, contrary to regulations 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951. The justices convicted the defendants of that offence.

The short facts as found by the justices are as follows: The defendants owned a motor-lorry and a trailer. In order that the braking system should be in proper order when the lorry was drawing the trailer a brake cable on the lorry had to be connected to a brake cable on the trailer. When the connexion was made the trailer's brakes could be operated by a lever in the cabin of the lorry. On November 10, 1953, the police stopped the lorry and trailer and found that the two cables were not connected. Apparently the lorry and trailer had left the defendants' premises that morning with the connexion properly made and the braking system in good order. The driver was one Cheeseman, and he had with him a boy to act as his assistant, both being servants of the defendants. They took the vehicles to premises of Whitbreads' Brewery to load up, and for that purpose it was necessary to uncouple the trailer. When the loading was completed Cheeseman left it to the boy to couple on the trailer. He coupled on the trailer, but failed to connect the cables properly and Cheeseman took no steps to check the connexions. The court was told that Cheeseman had been charged with "using" the trailer contrary to the regulations and had been convicted. As this case raises matters of some importance it is necessary to look closely at the relevant legislation.

By section 30 (1) of the Road Traffic Act, 1930, the Minister of Transport may make regulations with respect, inter alia, to the following matter: " (*g*) . . . for securing that brakes . . . " shall be efficient and kept in proper working order." Pursuant to that power the Minister made regulations 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951. [His Lordship read regulations 75 and 101, and continued:]

Pausing there, it seems clear that while the driver of a vehicle on the road uses that vehicle within the meaning of regulation 101, so also, if he be a servant, does his master whether that master be a private individual or a limited company, provided always that the servant is driving on his master's business. It cannot be said that only the servant uses and that the master merely causes or permits such use. In common parlance a master is using his vehicle if it is being used by his servant on his business, and there is still room for the application of the words " causes or permits " since he may request or permit a friend to use the vehicle.

Further, applying the well-known test laid down by Atkin J. in *Mousell Brothers Ld.* v. *London and North Western Railway Co.*,[1] it seems clear that the prohibition against user in contravention of regulation 75 is an absolute prohibition in the sense that no mens rea apart from user need be shown to constitute the offence. It is true that in *Reynolds* v. *G. H. Austin & Sons Ld.*[2] this court held that the very similar words in section 72 (10) of the Road Traffic Act, 1930, " If any person uses a vehicle or causes or " permits it to be used in contravention of this section . . . " he shall be guilty of an offence," did not constitute an absolute prohibition, but that was because certain conditions which had to be complied with to avoid contravention necessarily depended on the action of persons over whom the user of the vehicle could have no control. As was said by Lord Goddard C.J. in that case[3]: " A consideration of the conditions of section 25 (1) of " the Act of 1934, which have to be satisfied to make the journey " a special occasion, show that some impose a prohibition or some " duty on the user, who for this purpose is equivalent to the " owner: such are those in paragraphs (*a*), (*d*), (*f*) and (*g*). " Clearly no question of knowledge arises in regard to them. It " seems to me that quite different considerations apply to conditions (*b*), (*c*) and (*e*). The owner must, of course, be no

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[1] [1917] 2 K.B. 836, 845.

[2] [1951] 2 K.B. 135; [1951] 1 T.L.R. 614; [1951] 1 All E.R. 606.

[3] [1951] 2 K.B. 135, 146.

"party to a breach of them, but they appear to me to apply not "only to acts of the owner but to those of others whom he could "not control."

Devlin J., having dealt with the justification of punishing a man for something he knows nothing about, said[4]: "But if a "man is punished because of an act done by another, whom he "cannot reasonably be expected to influence or control, the law "is engaged, not in punishing thoughtlessness or inefficiency, and "thereby promoting the welfare of the community, but in "pouncing on the most convenient victim. Without the authority "of express words, I am not willing to conclude that Parliament "can intend what would seem to the ordinary man (as plainly as "it seemed to the justices in this case) to be the useless and "unjust infliction of a penalty."

In the present case, however, the maintenance of the braking system is wholly under the control of the master's servants and agents, and the prohibition is, in my view, absolute. Indeed, it is to be observed where in other regulations in Part III of the Order exercise of proper care and absence of knowledge is to be a defence, it is so stated: *cf.* regulations 73 and 80.

The defendants were, however, charged with permitting the use in contravention of regulation 75 which, in our opinion, at once imports a state of mind. The difference in this respect was pointed out as long ago as 1894 by Collins J. in *Somerset* v. *Wade*,[5] where he pointed out the difference between an absolute prohibition against a licensee selling to a drunken person and a prohibition against permitting drunkenness. In the latter case he must be shown to have known that the customer was drunk before he can be convicted: *cf.* also *Ferguson* v. *Weaving*.[6] Knowledge, moreover, in this connexion includes the state of mind of a man who shuts his eyes to the obvious or allows his servant to do something in the circumstances where a contravention is likely, not caring whether a contravention takes place or not: *cf.* *Goldsmith* v. *Deakin*,[7] *Prosser* v. *Richings*,[8] and *Churchill* v. *Norris*.[9] In the present case there is no evidence that the defendants by any responsible officer permitted in any such sense the user by Cheeseman in contravention of the regulation.

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[4] [1951] 2 K.B. 135, 149.

[5] [1894] 1 Q.B. 574, 577; 10 T.L.R. 313.

[6] [1951] 1 K.B. 814; [1951] 1 T.L.R. 465; [1951] 1 All E.R. 412.

[7] 150 L.T. 157; 50 T.L.R. 73; [1933] W.N. 255.

[8] 52 T.L.R. 677; [1936] 2 All E.R. 1627; [1936] W.N. 260.

[9] (1938) 158 L.T. 255.

It is urged, however, that the fact that the defendants are a limited company imports different considerations and that, whereas a private person could not be convicted unless there was evidence of knowledge on his part in the sense indicated above, yet, in the case of a limited company, that knowledge can be inferred. We are unable to see how different considerations can apply in the two cases. A person in this context must include a company, and permitting in the regulation must have the same meaning whether the "person" charged is a private individual or a company. Indeed, in *Mousell Brothers Ld.* v. *London and North Western Railway Co.*[10] the court emphasized that a limited company was not to be distinguished from any other principal: see *per* Lord Reading C.J.,[11] and Atkin J.[12] It is, of course, true that the defendants permitted Cheeseman to use the vehicles, and indeed, as the case finds, he was their responsible servant in charge of the vehicles whose job was to verify the condition of the brakes, but a permission to use is not, unless more is proved, a permission to use in contravention.

Finally, it was contended that Cheeseman had permitted the use in contravention and that the defendants had accordingly permitted such use. In other words, it is said that in committing the offence of the user in contravention he at the same time made his master guilty of the offence of permitting such user. In our opinion this contention is highly artificial and divorced from reality. We prefer the view that before a company can be held guilty of permitting a user in contravention of the regulation it must be proved that some person for whose criminal act the company is responsible permitted as opposed to committed the offence. There was no such evidence in the present case.

It was, however, suggested that this view was in conflict with the decision of this court in *Browning* v. *J. W. H. Watson (Rochester) Ld.*[13] In that case the respondents were charged with permitting a motor-coach to be used as an express carriage without a road service licence, albeit unknown to them, two members of the public had journeyed in the coach which, apart from them, was carrying members of a football club as a private party. The court held that, notwithstanding that absence of knowledge, the respondents had permitted such user, and it was said in the present case that that could only be on the basis that the respondents' driver had failed to see that only members of the club went in the coach. It is to be observed, however, that it was said,[14] "We cannot say here that, if a coach proprietor "lets a coach to a club for the conveyance of the members of "the club and allows people who are not members of the club "to get into the coach, he is not liable. Although there was no "wilful violation in this case, it is clear that the proprietors "should take some precaution, either by issuing tickets to the "members so that the proprietors could see that the people who "got on the bus were members, or by insisting that a servant "of the club, or the secretary, ensured that only members of the "party got on to the bus." In other words, it was the failure of the respondents' responsible officer to take any precautions that constituted the permission.

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[10] [1917] 2 K.B. 836.

[11] Ibid. 845.

[12] Ibid. 846.

[13] [1953] 1 W.L.R. 1172; [1953] 2 All E.R. 775.

In our view, therefore, this appeal should be allowed, albeit on the ground that the defendants would have had no answer if charged with using the vehicles in contravention of the regulations. Normally we should be very loth to allow the appeal on the ground that the defendants had been wrongly charged, but we have no such feelings in this case since, in our view, on the facts of this case, it cannot be suggested that they were in any way to blame, nor is it a case where it could be said that a conviction and fine would make them more alert to see that the law was observed. Where legislation, as here, throws a wide net it is important that only those should be charged who either deserve punishment or in whose case it can be said that punishment would tend to induce them to keep themselves and their organization up to the mark: *cf.* Devlin J. in *Reynolds* v. *G. H. Austin & Sons Ld.*[15] The appeal is accordingly allowed with costs and the conviction quashed.

Lord Goddard C.J. I will now read the judgment of the court in *Green* v. *Burnett and Chippeck Bedding Co. Ld.*

This is an appeal by way of case stated by justices for the West Riding of the County of York before whom two informations were preferred against the defendants, being the driver and owners respectively of a motor-van, for that each of them unlawfully did use a motor-van on which a certain part of the braking system was not maintained in good and efficient working order, and properly adjusted, contrary to regulations 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951. The justices dismissed the informations.

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[14] [1953] 1 W.L.R. 1176.

[15] [1951] 2 K.B. 135.

Having regard to the full judgment just delivered in *James & Son Ld.* v. *Smee* it is unnecessary for the court to say more than that the regulations lay down an absolute prohibition against user in contravention thereof and that, accordingly, the offence against both respondents was clearly proved. We may observe on what may perhaps be described as the merits that this is not a case, as the last one was, of the vehicle being sent out from the owners' premises in perfect condition. From the facts found by the justices it is evident that a defect in the braking had existed for some time though the defendants may not have known of it. In these circumstances the case is really indistinguishable from *Provincial Motor Cab Co. Ld.* v. *Dunning*,[16] which has never so far as we are aware been questioned. The case must go back with a direction to convict.

SLADE J. read the following judgment (in both cases): Regulation 101 of the Motor Vehicles (Construction and Use) Regulations, 1951, provides that, "If any person uses or causes "or permits to be used on any road a motor-vehicle . . . in "contravention of or fails to comply with any of the preceding "regulations contained in Part III of these regulations he shall "for each offence be liable to a fine not exceeding £20." Regulation 75 is one of the preceding regulations in Part III. Regulation 3 (5) applies the Interpretation Act, 1889, to the interpretation of these regulations. The Interpretation Act, 1889, s. 2 (1), enacts that "In the construction of every enactment relating to an "offence punishable on indictment or on summary conviction . . . "the expression 'person' shall, unless the contrary intention "appears, include a body corporate."

In each of the two appeals before the court a servant of a limited company, acting in the course and within the scope of his employment by the company, drove on a road a motor-vehicle (the property of the company) which contravened the provisions of regulation 75. In each case the company was also prosecuted in respect of the offence so committed by its servant. In one appeal the information took the form of charging the company with having permitted the use of the vehicle in breach of the statutory prohibition. In the other appeal the information charged the company with having used the vehicle in breach of the statutory prohibition.

[16] [1909] 2 K.B. 599; 25 T.L.R. 646.

It is now well settled law that if a servant, acting within the general scope of his employment, does an act which the law absolutely prohibits, the master (whether an individual or a company) is criminally responsible for that act even though he has expressly forbidden his servant to commit it: see, e.g., *Mousell Bros. Ld.* v. *London and North Western Railway Co.*,[17] *per* Lord Reading C.J.,[18] and Atkin J.[19]; *Barker* v. *Levinson*,[20] *per* Lord Goddard C.J.[21]; *Griffiths* v. *Studebakers Ld.*[22]

The law is equally well settled that liability for contravention of an absolute prohibition depends upon the fact of contravention and not upon the intention to contravene. Neither mens rea in its true sense of importing a blameworthy mind nor so-called mens rea, i.e., negligence in the form of a failure to take reasonable steps to prevent the offence, is a relevant matter for consideration, except upon the question of punishment.

My brethren take the view that regulation 101 upon its true construction creates an absolute prohibition against using, but not against permitting to be used. I agree with them in thinking that regulation 101 creates an absolute prohibition against using, but I am unable to agree with them in thinking that a distinction can be drawn between "using" and "permitting to be used" where the "person" charged is a company and the liability sought to be imposed is the vicarious liability of the company for the breach of an absolute prohibition by its servant whilst acting within the general scope of his employment. I am not dealing with, and I reserve for further consideration when the question arises, the position where no question of vicarious liability arises at all; for example, where a company permits its managing director to use one of its motor-vehicles for his own private purposes.

There may be some authority for the distinction between using and permitting where the master and servant are both individuals: *Evans* v. *Dell*.[23] I say "may be" because I am by no means clear upon precisely what footing that case was decided and, in particular, whether the court held that the prohibition there was an absolute one. I am, however, unable to persuade myself that the legislature intended to draw any such distinction where the master is (to use the words of the Interpretation Act) a body corporate; and I know of no authority which requires me so to hold. A master, who is an individual, can either commit an offence himself or he may cause or permit another to commit it. A company can only commit an offence by its servant.

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[17] [1917] 2 K.B. 836.

[18] Ibid. 843, 844.

[19] Ibid. 845.

[20] [1951] 1 K.B. 342; 66 T.L.R. (Pt. 2) 717; [1950] 2 All E.R. 825.

[21] [1951] 1 K.B. 342, 344.

[22] [1924] 1 K.B. 102; 40 T.L.R. 26.

[23] (1937) 53 T.L.R. 310; [1937] 1 All E.R. 349.

An individual uses a motor-vehicle when he is driving it himself, or perhaps when, although not actually driving it, he is nevertheless in charge of it: *Gifford* v. *Whittaker*.[24] "Causing "or permitting" a motor-vehicle to be used is, in the case of an individual, apt only to describe the position when some other person is driving it or is in charge of it. Compare the language of section 35 (1) of the Road Traffic Act, 1930: ". . . It shall "not be lawful for any person to use, or to cause or permit *any* "*other person* to use, a motor-vehicle on a road unless there is "in force in relation to the user of the vehicle by that person "or that other person, as the case may be . . ." (the requisite policy of insurance against third party risks). The words "any "other person" in this context would, I apprehend, include a chauffeur driving his employer's car in the course of his employment.

A company, on the other hand, can only use a motor-vehicle in the sense of permitting or causing another to use it. If, when a company's motor-vehicle is being driven by its servant in the course of his employment, there is any distinction to be drawn between the company using that vehicle and permitting it to be used, I ask myself in what possible circumstances the company can be said to be using the vehicle and not permitting it to be used, or can be said to be permitting its use and not to be using it. I can think of none.

Moreover, if, in regulation 101, the legislature intended to create a distinction between an absolute, and what I may call a qualified prohibition in relation to the user of a motor-vehicle on a road by a company I should have thought that that distinction was to be found in the words "causes to be used" as opposed to the words "uses" or "permits to be used." In this connexion I refer to the well-known passage from the opinion of Lord Wright in *Houston* v. *Buchanan*,[25] where he said that[26] "To 'cause' "the user involves some express or positive mandate from the "person 'causing' to the other person, or some authority from "the former to the latter, arising in the circumstances of the

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[24] [1942] 1 K.B. 501; 58 T.L.R. 195; [1942] 1 All E.R. 604.

[25] [1940] 2 All E.R. 179 (sub nom. *M'Leod (or Houston)* v. *Buchanan*); 1940 S.C. (H.L.) 17.

[26] [1940] 2 All E.R. 179, 187.

" case. To ' permit ' is a looser and vaguer term. It may denote " an express permission, general or particular, as distinguished " from a mandate. The other person is not told to use the " vehicle in the particular way, but he is told that he may do so " if he desires. However, the word also includes cases in which " permission is merely inferred. If the other person is given the " control of the vehicle, permission may be inferred if the vehicle " is left at the other person's disposal in such circumstances as " to carry with it a reasonable implication of a discretion or " liberty to use it in the manner in which it was used. In order " to prove permission, it is not necessary to show knowledge of " similar user in the past, or actual notice that the vehicle might " be, or was likely to be, so used, or that the accused was guilty " of a reckless disregard of the probabilities of the case, or a " wilful closing of his eyes. He may not have thought at all of " his duties under the section."

In the case of a company a distinction between " causing " and " permitting " seems to me to be far more appropriate to the requirement of some positive act or, indeed, negligent omission upon the part of, for example, a managing director of the company, as opposed to the mere act of a servant of the company in driving the vehicle in the course of his employment, than the drawing of an essentially artificial distinction between a company using and permitting the use of one of its vehicles.

In the course of the argument in *Reynolds* v. *G. H. Austin & Sons Ld.*[27] Lord Goddard C.J. asked whether it was true to say that a limited company can " use " a vehicle as opposed to causing or permitting it to be used. Had the matter been res integra it might well have been argued that a company could not " use " a vehicle, but could only cause or permit it to be used. The contention would have been that in relation to the words " If any person uses " in regulation 101 a contrary intention within the meaning of section 2 (1) of the Interpretation Act did appear. I am, however, precluded from considering that possible construction of the regulation by the fact that this court has held limited companies to have been properly convicted of " using " a motor-vehicle on a road when the vehicle has been driven by their servant in the course of his employment.

I am nevertheless of the opinion that the word " uses " means in the case of a body corporate " permits to be used "; that the two expressions in regulation 101 as interpreted by section 2 (1)

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[27] [1951] 2 K.B. 135, 140.

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of the Interpretation Act, 1889, are in the case of a company tautologous and, accordingly, that if the word "uses" creates an absolute prohibition (as I think it does) so also does the expression "permits to be used."

In the result I am therefore of opinion that in each of these appeals the company should be convicted. As my brethren take the contrary view the company which had the good fortune to be charged with "permitting" will escape whilst the company charged with "using" will be convicted. I am relieved to think that such an anomalous result will be unlikely to arise again in the future, since I imagine that those entrusted with the drafting of informations will know which of the two expressions to select in the future.

Lord Goddard C.J. The appeal in the first case is allowed with costs; in the second case the case will go back with a direction to convict.

Appeals allowed.

Solicitors: *Hugh-Jones & Co.; Solicitor, Metropolitan Police; Cummings, Marchant & Ashton, for R. C. Linney, Wakefield.*

J. F. L.

1954
Oct. 21, 22.

Roxburgh J.
(sitting as an additional judge of the Queen's Bench Division).

HERSOM *v.* BERNETT.

[1952 H. 4491.]

Agency—Undisclosed principal—Failure to disclose—Sale of goods later found to be stolen—Action by buyer to recover price of goods—Defence by seller of agency for named principal—Evidence of seller as to identity of principal false—Seller not permitted to set up case of agency for other undisclosed principal.
Estoppel.

The plaintiff bought from the defendant, who was purporting to act as agent for an undisclosed principal, certain goods which had been stolen by a person unknown. In an action for recovery of the price of the goods (which had to be surrendered to the true owner), the defendant pleaded that his principal was one W., and gave evidence to that effect, which the court rejected as false:—

Held, that whether or not a person who purports to contract as agent is personally liable if he refuses to disclose his true principal (a) in order that the principal may be sued or (b) in answer to interrogatories, if he names a principal in his defence and gives evidence in support of that allegation and the court holds that the person named was not his principal, he cannot thereafter be heard to say through his counsel that he may have had another principal. He must be treated as being himself the principal and liable as such.

Dictum of Lord Kenyon C.J. in *Owen* v. *Gooch* (1797) 2 Esp. 567 considered.

ACTION.

Twelve cases of peppermint oil were stolen by a person unknown. On or about September 18, 1951, the plaintiff contracted to buy the oil, paid the price, which was £824 7s. 6d., to the defendant, and obtained delivery of the goods. The goods had to be surrendered to the true owner, as, of course, the plaintiff had no title to them; and he then sued the defendant to recover the price, on the footing of a total failure of consideration. The defendant was prosecuted for receiving stolen goods and was acquitted.

His defence to this action alleged in substance that he contracted as agent for a vendor whose name was not disclosed at the time of the contract, and not as principal.

A point of law arose relating to the question whether in an action for breach of contract a defendant who, purporting to act as an agent, gives false evidence as to the identity of his principal, can, after the court has decided that his evidence is false, be heard to say through his counsel in argument that his principal was some other undisclosed person.

J. L. Elson Rees for the plaintiff. There appears to be no authority on this point and no case to support the contention of the defendant that, if the plaintiff cannot find the defendant's principal, the defendant can retain the money. Nor does there appear to be any decision to the contrary. There is, however, a dictum in the judgment of Lord Kenyon in *Owen* v. *Gooch*[1] which is favourable to the plaintiff's contention that the defendant can be held liable: "If goods are ordered to be delivered on "account of another, and after delivery the person who gave the "order refuses to inform the tradesman who the person is, in "order that he may sue him, under such circumstances he is "himself liable."

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[1] (1797) 2 Esp. 567, 568.

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Leonard Caplan Q.C. for the defendant. There appears to be no authority directly in point to support the contentions of the parties and reliance should not be placed on the dictum in *Owen* v. *Gooch*,[1] since the series of reports in which it is to be found have generally been looked upon with disfavour by the court. [Reference was also made to *Hutchinson* v. *Tatham*[2] and *Sebright* v. *Hanbury*.[3]]

ROXBURGH J. stated the facts and continued: I have already held that the plaintiff did contract with the defendant on the footing that he was acting as agent. If the further defence that the vendor was one Williams had been made good, this action would have failed; but I have held that the principal was not Williams and that the defendant's story of his business relationship with Williams was false from start to finish. On the other hand, I cannot hold as a fact that the defendant was himself the principal, though he may have been. More probably the thief was the principal, though it may have been a purchaser from the thief. The defendant says that, by the common law of England, he can now turn round and say: "Well, if I have lied and if "Williams was not my principal, still the plaintiff has not proved "that I had no principal and he cannot make me disclose his "name; so I, or the principal, will keep the plaintiff's money, "though, if the plaintiff were to find the principal, he could "recover his money from him and, if the principal never existed, "he could recover his money from me, the defendant."

I was not surprised to learn that Mr. Caplan was unable to find any decision or even dictum to this effect. I was more surprised to learn (but I am now satisfied that it is so) that Mr. Rees could find no decision to the contrary and only one dictum. The dictum, which is attributed in Espinasse's reports to Lord Kenyon in *Owen* v. *Gooch*,[1] is very old: "if goods are "ordered to be delivered on account of another, and after "delivery the person who gave the order refuses to inform the "tradesman who the person is, in order that he may sue him, "under such circumstances he is himself liable."

Mr. Caplan has drawn my attention to unfavourable comments by high judicial authority on this series of reports; but none the less it is, in my view, strange that nobody, neither a text writer nor a judge, has ever made any comments on that case, which is referred to in Story's Law of Agency, 9th ed., p. 354. I do not propose to lay too much stress on that dictum, especially as there really are three distinct stages to be considered, and I am not directly concerned with the first two stages.

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[1] (1797) 2 Esp. 567, 568.

[2] (1873) L.R. 8 C.P. 482.

[3] [1916] 2 Ch. 245.

It will be observed that Lord Kenyon refers to disclosing the name "in order that he may sue him." That limitation is, of course, important, and it appears to me, whether the dictum is right or wrong, that it disposes of a criticism of it which Mr. Caplan made. He said that, if that were the law, there would be no need for such cases as *Hutchinson* v. *Tatham*,[2] in which a duty to disclose the name of the principal was imported into the contract by custom on the footing that, unless imported by custom, there could be no such duty. But the two propositions are not co-terminous. The custom alleged in *Hutchinson* v. *Tatham*[2] was to disclose the principal's name within a reasonable time after the signing of the charterparty. That, of course, does not necessarily bear any relation to a moment of time at which somebody wants to start proceedings. Therefore, it does not seem to me that, even if I accepted the dictum of Lord Kenyon without qualification, I should be doing violence to anything implicit in *Hutchinson* v. *Tatham*.[2] However, I do not propose to embark on the question whether Lord Kenyon's dictum is wholly right, partly right, or altogether wrong. It may be that there is no right to obtain the name of the principal in order that an action may be brought (that is irrelevant in this case); or, again, it may be that there is such a right. That is the first stage.

The second stage is when the defence in an action has been delivered. It so happens in this case that the defence states the name of the alleged principal, so that again is not strictly relevant, but is, I think, none the less of collateral importance. What would be the position if the defence merely said that the defendant was agent without disclosing the name of his principal? Is the plaintiff entitled then to interrogate in order to find out the name of the principal or not? Again, strangely enough, there seems to be no direct authority on this point. I do not accept Mr. Caplan's submission that *Sebright* v. *Hanbury*,[3] a decision of Younger J., directly or indirectly shows that he is not so entitled. It is quite plain to my mind that Younger J. was not within measurable distance of considering the sort of problem with which I am today concerned.

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[2] (1873) L.R. 8 C.P. 482.

[3] [1916] 2 Ch. 245.

On the other hand, it is very strange that there is no direct authority on the point; but I propose to say nothing more about it, because in this case the defendant did disclose the name of the alleged principal. He was asked for particulars of " the said " alleged Williams," who was the alleged principal, "stating his " full names, his business address and/or his place of residence " and his telephone number or numbers (if any) "; and the answer was: " the said Williams was known to the defendant " only by that name, and the defendant, therefore, could not " particularize his name more fully. The rest of the matters " requested are interrogatories and not further and better " particulars."

Of course, whether or not the defendant was bound to disclose the name of the alleged principal, once he has done it he has, in my judgment, made this representation to the plaintiff: that his case at the trial will be that Williams was his principal; and I have no doubt (and in fact it was so) that the plaintiff believed that representation. On the face of that representation, the plaintiff prepared his case in a particular manner and, indeed, did it so effectively that, by cross-examination and otherwise, he completely demolished the defendant's allegation. It is equally obvious that, if the defendant had said that his principal was somebody else and had given some other description of him, the plaintiff would have prepared his case differently in the sense that he would have made researches in different quarters and would have asked different questions in cross-examination, and might or might not have succeeded in demolishing that allegation as well. Therefore, it seems to me to be impossible to say that there was not a representation of something which may not be strictly a fact, but a representation of the manner in which the defendant was going to conduct his case, a representation on which the plaintiff relied; and, if the defendant is allowed to withdraw that representation, the plaintiff necessarily suffers detriment.

In this case, however, I need not stop to decide whether that state of affairs per se would raise a case of estoppel or not, because it has gone far beyond that. There was no question of the defendant seeking at the trial to substitute some other principal for Williams. The case was fought out; he swore that Williams was the principal; and I decided that his evidence was false.

I cannot deny that I appear to be breaking new ground, and it does not seem to me that this point was under consideration, even indirectly, in any of the cases to which I have been referred;

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but I feel satisfied that there is no principle and no authority which precludes me from breaking this ground in the manner in which I propose to break it: it seems to me that a fundamental principle of justice requires that a defendant who has given false evidence that his principal was X should not be heard to say through his counsel in argument that his principal may have been somebody else, but must thereafter be treated as having no principal; or, in other words, as being himself the principal.

I need only add that this sort of estoppel, if that is a correct description of this fundamental principle (and I am by no means sure that it is), could not, by reason of its very nature, be pleaded, because it arises only during the course of the trial in consequence of the finding of the judge that the evidence of the defendant that X was the principal is false.

Therefore, in my judgment, this action succeeds, and the plaintiff must have judgment for £824 7s. 6d.

Order accordingly.

Solicitors: *Warmingtons & Trevor Jones and Samuel Price & Sons; Victor Mishcon & Co.*

J. L. D.

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[1953 W. No. 3967.]

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Oct. 15,
18, 19;
Nov. 9.

Denning, Jenkins and Morris L.JJ.

Agriculture — Agricultural land tribunal — Nominated members — Appointment by Minister — Members appointed by servant of Minister acting as secretary of tribunal—No specific authorization to make appointments on Minister's behalf—Prevailing practice—Absence of writing—Validity—Defect in appointment curable by statutory provisions for validation—Minister's certificate having force of compulsory purchase order for land—Validity of certificate —No application to High Court within six weeks of service of notice of certificate—Proceedings to question tribunal's decision barred—Acquisition of Land (Authorization Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *s.* 1, *Sch. I, Pt. IV, paras.* 15, 16—*Agriculture Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *ss.* 73, 74, 85, 92, *Sch. IX, paras.* 15, 20 (2), 22 (2).

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Tribunal—Statutory—Judicial criticism. Compulsory purchase. Omnia praesumuntur rite esse acta.

The Agriculture Act, 1947, by paragraph 15 of the Ninth Schedule, requires that the two nominated members of an agricultural land tribunal "shall, for each reference to the tribunal, be "appointed by the Minister." Two nominated members of such a tribunal, whose names were on selected panels, were informally approached to sit on the tribunal by a person who performed duties in the dual capacity of servant to the Minister and secretary of the tribunal, and who, though without specific authorization from the Minister, followed the prevailing practice established in the area by his predecessor. The two members sat on the tribunal, which purported to confirm a proposal by the Minister to give a certificate under section 85 (2) of the Act of 1947, retaining in his possession land under requisition which belonged to the plaintiff. The Minister gave such a certificate, and notice of its making was served on the plaintiff on October 4, 1952, while notice to treat was served a year later. On November 11, 1953, the plaintiff issued a writ asking for declarations that the certificate and the notice to treat were void:—

Held, (1) that it was competent to the Minister to authorize a servant of the Minister to exercise his power of appointing the nominated members.

(2) As to whether, on the evidence, the person acting as servant of the Minister and secretary to the tribunal was authorized to and did appoint the two nominated members in accordance with the relevant statutory provisions:

Per Denning L.J., that the absence in the person of any actual or professed authority to appoint on the Minister's behalf was a defect in the appointment.

Per Jenkins L.J., that it was possible for the person to have been effectively authorized, and he must be taken to have been, and that he had appointed the two members within the meaning of paragraph 15 of Schedule IX to the Act of 1947.

Per Morris L.J., that this prevailing practice of making the appointments was authorized by the Minister, but that the person erroneously appointed the two members in his capacity of secretary to the tribunal and not as agent for the Minister; but that was at most only a defect in the method of making the appointment.

(3) That if and in so far as the appointments were defective, such defect did not render the tribunal as constituted a nullity, but was a defect which could be and was cured by the provisions of paragraph 20 (2) of Schedule IX to the Agriculture Act, 1947.

(4) That the certificate issued under section 85 was, accordingly, a valid certificate which by virtue of section 92 of the Act of 1947 had effect as a compulsory purchase order under section 1 of the Acquisition of Land (Authorization Procedure) Act, 1946, and by the provisions of paragraphs 15 and 16 of Part IV of Schedule I to the Act of 1946 could not be challenged in the High Court save within six weeks of the service of notice of the giving of the certificate.

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Accordingly the action failed.

Decision of Stable J. [1954] 1 W.L.R. 1149; [1954] 2 All E.R. 776 reversed.

APPEAL from Stable J.[1]

In 1941 the Essex War Agricultural Executive Committee took possession of certain land. In 1947, while the land was still under requisition, the plaintiff, Mrs. Hilda Annie Woollett, became the owner in fee simple of some four acres of the land on which was a bungalow, and she occupied the bungalow. In October, 1949, the Minister of Agriculture and Fisheries released part of the land to the plaintiff and indicated that the remainder would probably be relinquished in December, 1950, and the plaintiff thereupon set about equipping herself for working the land as a smallholding. Six months later, however, notices were issued that the land would be compulsorily purchased, and despite representations by the owner objecting to this, the Minister gave notice in writing on June 16, 1951, that he proposed to give a certificate under section 85 (2)[2] of the Agriculture Act, 1947, relating to, inter alia, the plaintiff's land. The plaintiff appealed against the Minister's proposal, and on September 24, 1951, her objection, together with the objection of a number of other owners whose land was affected by the proposal, was heard by an agricultural land tribunal, purporting to be constituted in accordance with the provisions of Schedule IX to the Act of 1947, and consisting of a chairman who had been duly appointed by the Lord Chancellor, and two other persons whose names appeared on panels drawn up by the Ministry, one representing the interests of agricultural landowners and the other the interests of farmers. On October 12, 1951, the tribunal issued its decision purporting to confirm the proposal of the Minister in respect of the land of the plaintiff and of all but six of the other objectors, but gave no reasons for its decision. A year later, on September 30, 1952, a certificate under seal authenticated by a senior civil servant in the Ministry who was authorized by the Minister to authenticate the seal, was issued, relating to the land of the plaintiff and of various other owners, certifying, in pursuance of his powers under section 85, that the Minister was satisfied that it was necessary for the purpose of enabling him to secure or maintain the full and efficient use for agriculture that possession of the land should be retained by him or on his behalf. On October 4, 1952, notice of the giving of the certificate was served, and on October 16, 1953, a notice to treat was served on the plaintiff. On November 4, 1953, the plaintiff, as she was entitled by the Act to do, asked to see the report made by the tribunal to the Minister, but found that it gave no reasons to justify or explain the decision to retain the land.

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[1] [1954] 1 W.L.R. 1149; [1954] 2 All E.R. 776.

[2] Agriculture Act, 1947, s. 85: "(1) The following provisions . . . "shall have effect for the purpose of "enabling the Minister to secure or "maintain the full and efficient use "for agriculture—(*a*) of agricultural "land of which the Minister or a "person acting under his authority "is in possession. . . . (2) Where "the Minister or any person acting "under his authority is in possession "of the land mentioned in paragraph "(*a*) . . . under powers conferred by "regulations made under the Emergency Powers (Defence) Acts, 1939 "to 1945 . . . and the Minister is "satisfied that it is necessary for the "purpose mentioned in the last foregoing subsection that possession of "the land should be retained by him "or on his behalf, and certifies accordingly, the Minister may purchase "the land compulsorily in accordance "with the provisions of this Act in "that behalf. . . . (4) The Minister "shall not give a certificate under this "section until, after affording . . . "an opportunity of making representations to the Minister . . . "he has given notice in writing to "[certain classes of person] of the "Minister's proposal to give the certificate. (5) Any person to whom "notice of a proposal is given . . . "may require that the proposal shall "be referred to the Agricultural Land "Tribunal established under this Part "of this Act."

S. 73: "(2) The provisions . . . of "the Ninth Schedule to this Act shall "have effect as to the constitution of "agricultural land tribunals. . . ."

Sch. IX, para. 13: "(1) An agricultural land tribunal shall consist of a chairman and two other "members."

Para. 15: "The two members of "an agricultural land tribunal other "than the chairman (hereinafter referred to as 'nominated members') "shall, for each reference to the tribunal, be appointed by the Minister ". . ." Para. 20: "(2) All acts "done at any meeting of any such "body shall, notwithstanding that it "is afterwards discovered that there "was a defect in the appointment ". . . of a person purporting to be a "member thereof, be as valid as if "that defect had not existed."

On November 11, 1953, namely, 13 months after the Minister had issued the certificate under section 85, the plaintiff issued a writ, and brought proceedings in the High Court for declarations that the certificate dated September 30, 1952, and the notice to treat were null and void. She alleged that the tribunal purporting to confirm the Minister's proposal was not validly constituted, in that the members other than the chairman were not appointed by the Minister in accordance with the provisions of the Agriculture Act, 1947, but had been appointed by the chairman, and that the alleged confirmation was null and void. She also alleged that the certificate of the Minister was null and void in that it was not made by the Minister as required by the Act, and related to the land of various other persons in addition to her land.

The Minister denied the allegations. Alternatively, he contended that, as no application had been made to the High

Court within six weeks of the service of notice of the giving of the certificate, it could not, by virtue of section 92 of the Agriculture Act, 1947,[3] and section 1 and paragraphs 15 and 16 of the First Schedule to the Acquisition of Land (Authorization Procedure) Act, 1946,[4] be questioned. He also relied on paragraph 20 (2) of the Ninth Schedule to the Agriculture Act, 1947, as validating the proceedings of the tribunal.

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[3] Agriculture Act, 1947, s. 92: " (1) Subject to the provisions of this " section, where under any provision " of this Act power is conferred on " the Minister or a smallholdings " authority to purchase land compul- " sorily, the power shall be exer- " cisable for the purchase of any parti- " cular land on the Minister or the " authority, as the case may be, being " authorized so to purchase the land " in accordance with the provisions " of the Acquisition of Land (Autho- " rization Procedure) Act, 1946, and " that Act shall apply accordingly— " (*a*) as if paragraph (*b*) of subsec- " tion (1) of section one thereof " (which refers to the compulsory " purchase of land by the Minister " of Transport under certain enact- " ments) included a reference to any " compulsory purchase of land by the " Minister under this Act, and (*b*) as " if this Act had been in force im- " mediately before the commencement " of the said Act of 1946. . . .

" (2) Where under any provision " of this Act power is conferred on " the Minister to purchase any parti- " cular land compulsorily on the " giving of a certificate by him, the " certificate shall have effect as if it " were a compulsory purchase order " made under section one of the said " Act of 1946. . . . (*c*) in the appli- " cation to the certificate of Part IV " of the First Schedule to the said " Act of 1946 (which relates to the " validity and coming into operation " of compulsory purchase orders) for " references to the first publication " of notice of the making of an order " there shall be substituted references " to the service of notice of the giving " of the certificate, and for references " to the requirements of the said First " Schedule and of regulations made " thereunder there shall be substituted " references to the requirements of " this Act as to the proceedings to be " taken before the giving of the certi- " ficate."

[4] Acquisition of Land (Authorization Procedure) Act, 1946, Sch. 1, para. 15: " (1) If any person aggrieved by " a compulsory purchase order desires " to question the validity thereof, or " of any provision contained therein, " on the ground that the authorization " of a compulsory purchase thereby " granted is not empowered to be " granted under this Act or any " such enactment as is mentioned in " subsection (1) of section one of this " Act, or if any person aggrieved by " a compulsory purchase order or a " certificate under Part III of this " Schedule desires to question the " validity thereof on the ground that " any requirement of this Act or of " any regulation made thereunder has " not been complied with in relation " to the order or certificate, he may, " within six weeks from the date on " which notice of the confirmation or " making of the order or of the giving " of the certificate is first published " in accordance with the provisions of " this Schedule in that behalf, make " an application to the High Court, " and on any such application the " court—(*a*) may by interim order " suspend the operation of the com- " pulsory purchase order or any pro- " vision contained therein, or of the " certificate, either generally or in so " far as it affects any property of the " applicant, until the final deter- " mination of the proceedings; (*b*) if " satisfied that the authorization " granted by the compulsory purchase " order is not empowered to be " granted as aforesaid, or that the " interests of the applicant have been " substantially prejudiced by any re- " quirement of this Schedule or of " any regulation made thereunder not " having been complied with, may

At the hearing before Stable J., the Minister exercised his discretion and allowed evidence to be called on his behalf, which established the general practice followed in the area in convening the tribunals to sit to consider references under section 85 of the Act, and also and more particularly that which had taken place in the present instance, as follows: In June, 1950, one Comins, who had since 1944 been an official of the Ministry of Agriculture and Fisheries attached to the staff of the provincial land commissioner of the eastern province, took over, on the instructions of the commissioner, from one Smithies (another official of the Ministry on the staff at Cambridge) the office of secretary to the agricultural land tribunal for the eastern province. The papers, books, documents and lists containing the names of the panel of persons eligible for appointment as nominated members under paragraph 15 of Schedule IX to the Act were handed to him, and he was told how to carry on. Thereafter he carried on the same procedure as Smithies had previously carried on. At no time did he have any specific written authority from the Minister or any express instructions saying that he was to appoint on behalf of the Minister; but he understood that he was performing his duty. His appointment as secretary to the tribunal carried no extra salary. It was part of his work, which he carried out in the same office as he did his work as a servant of the Ministry.

His usual practice when a reference was in prospect was to telephone to two of the persons on the panel (one from each of the two categories of nominated persons mentioned in paragraph 15 of Schedule IX) and ask them whether they could sit on a particular date, and when he found two who could do so, he wrote confirming the arrangement. He did not as a rule consult the chairman before selecting the names, but occasionally, in cases which he regarded as of special importance, concerned with

" quash the compulsory purchase order " or any provision contained therein, " or the certificate, either generally " or in so far as it affects any pro- " perty of the applicant. (2) Except " by leave of the Court of Appeal, no " appeal shall lie to the House of " Lords from a decision of the Court " of Appeal under the last foregoing " sub-paragraph."

Para. 16: " Subject to the pro- " visions of the last foregoing para- " graph, a compulsory purchase order " or a certificate under Part III of " this Schedule shall not, either before " or after it has been confirmed, made " or given, be questioned in any legal " proceedings whatsoever, and shall " become operative on the date on " which notice is first published as " mentioned in the last foregoing " paragraph."

compulsory acquisition under section 85 of the Act of 1947, as here, he would tell the chairman what persons he intended to approach, and ask the chairman whether he agreed.

The two nominated members who sat as members of the tribunal for the present reference were a Mr. Elliott, one of the persons on the panel nominated by the Central Landowners' Association (that being the body designated by the Minister under paragraph 15 of Schedule IX as appearing to him to represent the interests of owners of agricultural land) and a Mr. Soper, one of the persons on the panel nominated by the National Farmers' Union (that being the body designated by the Minister under the same paragraph as appearing to him to represent the interests of farmers).

On this occasion Comins told the chairman that he proposed to ask Mr. Elliott to sit, and the chairman approved. Thereupon, Comins arranged orally with Mr. Elliott to sit on the proposed date; and a similar arrangement was made with Mr. Soper. After the oral arrangements were made, Comins wrote letters to each of them, confirming the arrangement, and later sending documents and details relating to the reference for September 24. All Comins' letters were on paper headed with the name and address of the tribunal and were signed "P. R. Comins, Secretary."

In pursuance of these arrangements, the chairman, Mr. Elliott, and Mr. Soper sat at Chelmsford on September 24, 1951, to consider the present reference. At the beginning of the proceedings, the solicitor for the Minister explained that the chairman was a member of the legal profession appointed by the Lord Chancellor, and that the other two members were taken from panels nominated by the National Farmers' Union and the Central Landowners' Association respectively; whereupon the chairman of the Farmers' and Smallholders' Association, the Rev. Eric Marsh, who was present, rose and said: "Would the solicitor "for the Ministry please say who appointed the two nominated "members?" As the solicitor did not reply, Mr. Marsh followed this up by saying: "I will tell you. The Ministry of Agriculture "appoints the two nominated members," his object being to discredit the tribunal on the ground that it was so constituted as to make the Minister judge in his own cause. In order to refute that suggestion, the chairman intervened to say: "Mr. Marsh, "you need not concern yourself. I myself selected" (or "appointed") "the two nominated members," or words to that effect.

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Stable J., while accepting the evidence of Mr. Marsh that the chairman had said that he himself " appointed " rather than " chose " or " selected " the nominated members, found that they had been appointed in fact by Comins, acting in his capacity as secretary to the tribunal and not as a servant of the Minister to whom had been delegated the selection and appointment of members of the tribunal. He held, accordingly, on July 21, 1954, that as the members of the tribunal had not been appointed " by " the Minister " in accordance with paragraph 15 of Schedule IX to the Act of 1947, the tribunal had not been properly constituted, and its determination, and also the Minister's certificate given in pursuance thereof, were null and void; that as the reference had not been made to a properly appointed tribunal, the certificate was not a certificate within the Act, and that, therefore, notwithstanding that no application had been made to the High Court within six weeks of the service of notice of the making of the certificate, paragraph 16 of Schedule I to the Acquisition of Land (Authorization Procedure) Act, 1946, did not apply, and the court was accordingly not precluded from declaring that the certificate was null and void.

The Minister appealed.

Sir Reginald Manningham-Buller A.-G., Q.C. and *Bazil Wingate-Saul* for the Minister. It was competent to the Minister to authorize a member of the Ministry staff, namely, Comins, to exercise his powers or perform his duty of appointing the two nominated members. In *Carltona Ld.* v. *Commissioners of Works* [5] Lord Greene M.R. said that no Minister could personally attend to all the various functions placed on him, and that any complaint as to the exercise of those functions should be made in Parliament [6]: see also *Metropolitan Borough and Town Clerk of Lewisham* v. *Roberts* [7] (Bucknill, Denning and Jenkins L.JJ.[8]) on administrative practice in government departments. Stable J. said that that case was distinguishable because there the letter did refer to " a direction by the Minister of Health," whereas here Comins wrote as the secretary of the tribunal and nothing else; but the distinction is not valid. The question is not whether Comins thought or said that he had the Minister's authority, but whether in fact he had. Paragraph 22 of Schedule IX requires the secretary to be an official of the Ministry; there was a long course of similar conduct, and it was of practical importance that the secretary should have power to appoint the nominated members. The official of the Ministry does not lose that character when he is attached as secretary to the tribunal; he is still paid the same salary by the Ministry.

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[5] [1943] 2 All E.R. 560.

[6] Ibid. 564.

[7] [1949] 2 K.B. 608; 65 T.L.R. 423; [1949] 1 All E.R. 815.

[8] [1949] 2 K.B. 608, 616, 618, 621–2, 628–9.

On the evidence and the authorities it is submitted that: (1) The two nominated members were appointed when Comins spoke to them and were not appointed by any letter written by him as secretary. They were appointed, as the Act requires, by the Minister acting through him. (2) They were appointed by Comins and by no one else, and there was no ground for the judge's conclusion that they were not appointed by anyone. (3) Once it is proved that Comins was at all material times a senior official of the Ministry, the principle "omnia praesumuntur "rite esse acta" applies. The Minister relies not only on that principle but also on the evidence that Comins was instructed by his superior to do the work as it had been done by his predecessor in the office, and that he continued to do it in that way in appointing the two nominated members for each reference. Moreover, Comins could not act in his capacity as secretary to the tribunal until after the tribunal had been constituted, so that though he might refer to himself as "secretary" he would not act as such until after the nominated members had been appointed. (4) If there were any defect in the appointment of these two nominated members, paragraph 20 (2) of Schedule IX to the Act of 1947 applies and is a complete answer to the action. Paragraph 20 (2) should be given a wide interpretation, having regard to the fact that the validity of the acts of the tribunal is not to be challenged even though someone under paragraph 19 is disqualified from sitting, for a defect in the appointment of a qualified person is not so vitally important as the appointment of a disqualified person. This is not a case where there was an appointment of disqualified persons, though that, too, could be cured by paragraph 20 (2). The allegations here are (a) that Comins had no authority from the Minister to appoint anyone, and (b) that when he made the appointments he thought that he was acting for the tribunal. Since the evidence is that he had authority, it might be regarded as a "defect in the appointment" that he himself thought he was acting as secretary. But the defect is curable by the wide terms of paragraph 20 (2). (5) In any event, this action was out of time. If a person seeks to challenge the validity of the Minister's certificate under section 85 on the ground that one of the requirements of the Agriculture Act, 1947, has not been complied with, it must be done within six weeks of the date on which notice of the giving of the certificate was received. Where a certificate has been issued under section 85 of the Act of 1947, the effect of section 92 of that Act is that the certificate is to be regarded as a compulsory purchase order, section 92 requiring that a reference to the Agriculture Act, 1947, must be read into section 1 of the Acquisition of Land (Authorization Procedure) Act, 1946. Then by paragraph 15 of Schedule I of Part IV of the Act of 1946 a person aggrieved by a compulsory purchase order has six weeks in which to complain to the court; but by paragraph 16, once the six weeks have elapsed—in the present instance, six weeks from October 4, 1952—the certificate cannot be challenged. It is precisely that challenge which was made by the plaintiff here, 13 months later, and that is not permitted under the Act of 1946.

Finally, on a practical aspect of the matter, it is difficult to make official appointments of these nominated members, since all the persons on the panel are volunteers, and appointments have therefore to be made by rather informal approaches.

[DENNING L.J. There ought to have been a letter from some responsible person. I doubt whether it was the legally correct procedure.]

The Act does not require the appointment to be in writing. The words "in writing" are legal words and cannot be implied. But it is a criticism that there was not a written appointment.

A. P. Marshall Q.C. and *Gilbert Dare* for the plaintiff. The presumption "omnia praesumuntur rite esse acta" is rebuttable, and here there was evidence on which Stable J. could conclude that the two nominated persons were not appointed. It is submitted on the evidence (a) that there was no appointment, and (b) that if there was, it was not by a properly delegated agent of the Minister.

On (a), the defence pleadings admitted that there was no express delegation by the Minister of his powers, but said that there was a prevailing practice. That is a serious situation. These are judicial appointments, in which the only persons who stand between the Minister and the holder or tenant of the land are the two nominated members who, when appointed, can outvote the chairman. There ought, therefore, to be delegation only to a senior official in unequivocal terms. If, indeed, a practice grew up as alleged, the evidence is consistent with its being a wrong practice. The change of language in different paragraphs of Schedule IX is to be noted, "appointed" being used in paragraphs 14 and 15 in reference to the members of the tribunal, and "selected" in paragraph 16 for assessors without voting rights. "Appointment" must be express. The Oxford Shorter English Dictionary, defining "appointment in matters of law," states: "To declare an appointment under a power."

[JENKINS L.J. That is only in the conveyancing sense.]

On (b), Comins on the evidence quite plainly had to act in a dual capacity. When co-opting members he did not go to the Minister but to the chairman. He acted as secretary to the tribunal and not on the Minister's authority. All the documents are tribunal documents. The burden of proof that his acts were not merely the acts of the secretary lies on the Minister. If a matter is orally negotiated and subsequently confirmed by written document on behalf of the tribunal, the presumption is that that which it seeks to confirm was an act done in the same capacity. Accordingly, it is submitted, there was on the evidence no appointment in accordance with the statutory requirements, and therefore no tribunal.

The submission that there was no tribunal to which Comins could be attached as secretary until the two nominated members had been appointed is not valid, in view of the procedural orders which the Minister in fact issued in the exercise of his powers under sections 73 and 74 of the Act of 1947.

The conditions precedent for the issue of the certificate were not satisfied, and the provisions of paragraph 20 (2) of Schedule IX to the Act of 1947 cannot be invoked to cure any defects, for if there was no appointment there could be no "defect "in the appointment." Support for that submission is to be found in *Morris* v. *Kanssen*,[9] where, considering section 143 of the Companies Act, 1929, and article 88 of Table A, Lord Simonds said that the section, which uses words kindred to those in paragraph 20 (2) here, could only be used to rectify slips and not to give validity where the substantive provisions of an Act as to appointment had been entirely ignored.[10] It follows that the certificate here, issued on the determination of a tribunal to which there was no appointment, must be a nullity, and paragraph 20 (2) cannot assist to cure the situation.

If the document purporting to be the Minister's certificate is a nullity, the plaintiff is not barred from proceedings in the High

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[9] [1946] A.C. 459; [1946] 1 All E.R. 686.

[10] [1946] A.C. 459, 471–2.

Court by the six-week limitation period under paragraph 16 of Schedule I of Part IV of the Acquisition of Land (Authorization Procedure) Act, 1946. Incidentally, nothing on the Minister's certificate or the notice that the certificate had been given tells the owner of land that it is a compulsory purchase order or refers to the Act of 1946, so that the owner does not know of any limitation of action unless he can consider all the implications of this complicated legislation by reference.

If the document issued by the Minister is not a nullity, then it is submitted that it is one to which, on a true construction of section 92 of the Act of 1947 and of paragraphs 15 and 16 of Schedule I to the Act of 1946, the limitation does not apply. The present certificate falls under section 92 (2) as one which "shall have effect as if it were a compulsory purchase order." But it is only under subsection (1) of section 92, which covers cases where there has been a straightforward compulsory purchase order, that a reference to the Agriculture Act, 1947, has to be read into the Act of 1946. Therefore, though subsection (2) gives the Minister power to purchase compulsorily, it does not make the certificate issued under section 85 a compulsory purchase order which carries with it the right of questioning its validity within six weeks. Moreover, considering paragraph 15 of Schedule I of Part IV of the Act of 1946, the only "certificate" there referred to is a Part III certificate—which this admittedly is not. That means that the plaintiff here would be limited in questioning its validity to the first limb of paragraph 15, namely, she can question it only on the ground that the "authorization "of a compulsory purchase is not empowered to be granted," etc., and cannot question it as a certificate within the later words of paragraph 15 on the ground that "any requirement of this Act ". . . has not been complied with. . . ." As the present case does not come within the first words of paragraph 15 because it is a section 92 (2) case and not a straightforward compulsory purchase order, and as the second part of paragraph 15 does not apply to it at all, the limitation of action is wholly inapplicable and the plaintiff is entitled to bring this action.

Sir Reginald Manningham-Buller A.-G., Q.C. in reply. The court's construction of paragraph 15 is of great importance since it applies to so many forms of compulsory purchase. The interpretation contended for by the plaintiff would narrow the possibility of an individual challenging a compulsory purchase order. In the Act of 1947 there are express powers of compulsory purchase under sections 82, 84, 85 (2), 86 and 87 (1), with the requirement that the Minister must give a certificate. Section 92 sets out the procedure for compulsory purchase. Section 92 (1) is of general application to all the sections referred to, and its effect is that if anyone wishes to challenge what is done by the Minister on the first ground in paragraph 15 of Schedule I of the Act of 1946, that subsection brings it in. Section 92 (2) covers two other cases where a certificate is required; it is not exclusive but additional. The whole of section 92 applies to acquisitions under section 85, and if anyone wishes to challenge a certificate given under that section which has the effect of a compulsory purchase he can do so if he brings himself within paragraph 15. If he cannot do that he cannot challenge it at all.

The certificate cannot be regarded as void. All the conditions imposed on the Minister were complied with. The whole intent of the legislation is that the time for challenge should be limited, and once the six weeks have gone no challenge on any ground is possible.

Cur. adv. vult.

November 9. Denning L.J. At Woodham Ferrers in Essex before the war there were two building estates which had been laid out in building plots but had not been developed. Much of the land was unused in 1939 when the war broke out and it was essential to turn it to productive use; so the Minister of Agriculture on July 1, 1941, requisitioned it. In all he requisitioned 217 acres, much of it being in small plots owned by different owners. He told the owners that possession could be retained by him (the Minister) for the duration of the war and three years afterwards. One of the owners owned a bungalow and a plot of nearly four acres next to it. The Minister took possession of the four acres and paid a small annual sum for it. In June, 1947, while the land was still under requisition, Mrs. Woollett bought the bungalow, together with the four acres. Her idea was that she and her husband would work up a smallholding. They went into occupation of the bungalow, but they could not at that time take possession of the four acres, as it was still under requisition.

On September 2, 1949, the Minister told all the owners that, as a matter of general principle, it had been decided by him that requisitioned land would be released as soon as possible after Michaelmas, 1950; but in the case of the Woolletts the Minister did release some of the land earlier. On October 11, 1949, the Minister released to them one acre of their land and told them that the remainder (three acres) would probably be relinquished in December, 1950. The Wooletts thereupon set to work getting ready for the time when they would have their three acres handed over to them. They bought a rotary hoe and various other implements, built an agricultural store and cultivator shed, laid a roadway, and so forth. But six months later the Minister changed his mind about releasing the land to the various owners. On June 16, 1950, he put a public notice in the local paper saying that he proposed to retain it: and on July 15, 1950, he sent a statutory notice to the Wooletts, among others, saying that he proposed to give a certificate with a view to acquiring their land by compulsory purchase, but giving them an opportunity to make representations on the matter. On July 25, 1950, the Wooletts and others made written representations objecting to the compulsory purchase of their land, and followed it up by verbal representations at a hearing before the provincial land commissioner. The Minister decided, however, to proceed with the purchase. On June 15, 1951, he gave another statutory notice saying that, having considered the representations made by the Wooletts, he now proposed to give the statutory certificate; but he notified them that they could appeal to the agricultural land tribunal.

The Wooletts promptly gave notice of appeal. So did several other owners. In all 25 owners of plots appealed. The appeals came on for hearing at Chelmsford on September 24, 1951, before a tribunal composed of Sir Cecil Oakes, a Mr. Elliott and a Mr. Soper. The hearing lasted a full day. The tribunal inspected the property on October 6, 1951, and on October 12, 1951, issued their decision.

In the result, out of the 25 appeals, six were allowed, and in those cases the land was returned to the owners: but 19 appeals were dismissed. Mrs. Woollett was among those whose appeals were dismissed. The tribunal decided that the statutory conditions had been fulfilled and confirmed the proposal of the Minister, but they gave no reasons for their decision. They made a bald report confirming the Minister's proposal.

A year later, on September 30, 1952, the Minister gave the statutory certificate by which he certified that he was "satisfied "that it is necessary for the purpose of enabling him to secure "or maintain the full and efficient use for agriculture of the said "land that possession of the said land should be retained by him "or on his behalf." By virtue of this certificate, under section 85 (2) of the Agriculture Act, 1947, the Minister was empowered to purchase the land compulsorily. On October 4, 1952, the

Minister duly gave notice to Mrs. Woollett that he had issued his certificate, but he did not take any action on it for a long time. We were told that in some cases he has released land even after issuing a certificate: but he did not release the three acres belonging to the Wooletts. The Minister let another year slip by, until, on October 15, 1953, he served notice to treat on Mrs. Woollett. Thereupon Mrs. Woollett, on November 4, 1953, asked to see the report which the tribunal had made to the Minister. It is a report which, by statute, Mrs. Woollett was entitled to see: but, as it turned out, it told her nothing; no reasons to justify the decision to take her land; just a bare confirmation of the Minister's proposal, and nothing else.

A little later, on November 11, 1953, Mrs. Woollett's solicitors issued a writ claiming that the certificate was void and of no effect, and also that the notice to treat was likewise void.

What I desire to emphasize at the outset is that this court has nothing to do with the merits or demerits of the Minister's action. These humble folks, the Wooletts, had bought this small piece of land (it was only three acres) intending to work up a smallholding on which to live. It does seem strange that a government department should compulsorily take it from them when they were ready and anxious themselves to put it to food production—all the more so when it is remembered that the government department had led them to believe that the land would be released to them, and they had expended much money on the faith of it. There may be good reasons for the proposal of the Minister and for the decision of the tribunal confirming it; but I must say that it is a pity that the tribunal gave no reasons. It may be that the tribunal were not bound to give reasons, though I am not so sure about this. The statute gives Mrs. Woollett a right to see their report, and what is the point of her seeing it if it tells her nothing when she gets it? Be that as it may, if they had given reasons, they might have done something to remove the sense of grievance which the Wooletts must inevitably feel, and to allay the disquiet which must disturb the public conscience because of what has happened.

Moreover, if they had given reasons, these courts could have inquired into their validity in point of law: but as it is, with no reasons given, no such inquiry is permissible. This court is precluded from considering the case on its merits. It has perforce only to consider it on technical grounds; for the

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only points which counsel have been able to raise against these proceedings are, I fear, technicalities. I do not say they are trivial, only that they are technical.

Let me explain what they are. First, it is said that the tribunal was not validly constituted because two of the people who sat on it had never been appointed to it at all. Under Schedule IX to the Act of 1947, an agricultural land tribunal must consist of a chairman to be appointed by the Lord Chancellor, and two other members to be appointed by the Minister of Agriculture. Both the Lord Chancellor and the Minister are, however, limited in their choice of men. The Lord Chancellor must appoint as chairman a barrister or solicitor of not less than seven years' standing. The Minister must appoint one member from a panel nominated by the Central Landowners' Association and the other member from a panel nominated by the National Farmers' Union. The three men who sat on the tribunal did, in fact, have the necessary qualifications. The chairman, Sir Cecil Oakes, was a solicitor of more than seven years' standing. Mr. Elliott was one of the panel nominated by the Central Landowners' Association. Mr. Soper was one of the panel nominated by the National Farmers' Union. No one suggests that they were not suitable and proper men to sit on the tribunal, but it is said that the two nominated members were never appointed by the Minister himself, but only by the chairman or the secretary of the tribunal.

It happened in this way: [His Lordship then stated the facts set out above, as to the prevailing practice in appointing nominated members to sit on the tribunal and the particular practice followed on the present occasion, including an account of what took place at the hearing on September 24, 1951, when the chairman of the tribunal stated that it was he who had "selected" or "chosen" or "appointed" the nominated members, and continued:] In making that observation the chairman was apparently in his own mind drawing a distinction between "selecting" the two members and "appointing" them. He was emphasizing that it was he who had selected them, although he had not appointed them. I do not think that his hearers would appreciate that nice distinction, unless he explained it to them, which he did not do. From his words they would think that the chairman had himself appointed the two members. At any rate, both Mrs. Woollett and Mr. Marsh gained that impression. And from those words springs the principal complaint in this action, because it is said that if the chairman appointed the other two members, or, indeed, if the secretary of the tribunal appointed them, they were never appointed at all, because under the Act neither the chairman nor the secretary, but only the Minister had any power to appoint them.

It was, I think, unfortunate that the chairman gave those present the impression that he had himself appointed the other two members of the tribunal. It is true that he was consulted about them, but he did not appoint them. If he did not, who did? Did Mr. Comins, the secretary, appoint them? I doubt it. I do not know that anyone really appointed them. All that happened was that Mr. Comins arranged for these two members to sit. Mr. Comins at that time filled the dual role of land service assistant to the Ministry, and secretary to the tribunal. It was he who made the arrangements; but in what capacity did he make them? No one can say with any certainty. He could not even say himself. He was asked in cross-examination: "In this choice and getting the people to sit as additional "members, you were acting as the secretary? (A) I could not "say that. I probably should not think who I was at the time: "that would come automatically." It is to be noted that, when he wrote the confirming letter, he wrote as secretary of the tribunal. In these circumstances it seems to me that Mr. Comins was acting much as a clerk to the justices does; he arranges for the magistrates to sit, but he does not appoint them. Mr. Comins was acting in the comparatively humble capacity of secretary or clerk, and nothing else. In support of this view I would point out that Mr. Comins did not have any express authority from the Minister to make appointments on his behalf. He could produce none, and his predecessor produced none. Indeed, his predecessor was not called. The Attorney-General invoked the maxim that everything is presumed to have been rightly done: but I am not prepared to apply the maxim in this case. Quite enough took place here to call for inquiry. The public statement of the chairman threw the whole matter open for investigation. The Minister acknowledged this by calling evidence before the judge; and the evidence fell far short of showing any authority in Mr. Comins to make the appointments.

In the result, I do not think that anyone in authority ever appointed these two members to sit. The simple fact is that they were on the panels and the secretary of the tribunal arranged for them to sit without anyone appointing them as the

Act required. This was an irregularity which is regrettable. These tribunals deal with matters which are just as important to the people of this land as many of the matters which come before the courts of law. Often they are more important. These tribunals pronounce on the imperious act of compulsorily acquiring a man's property in which he has invested all his capital—or of dispossessing a farmer from the land which he and his family have tilled for generations—and until recently they did it with complete finality. There is now an appeal on questions of law to the High Court. Yet the members of the tribunals undertake these high tasks without the sanction of a judicial oath and without so much as a formal appointment: and they can decide by a majority vote in which the two nominated members can outvote the legal chairman.

I am quite aware that the Act does not require any formalities, and that the Minister can act by any servant in his department, at any rate so long as the servant uses the magic words "I am "directed by the Minister" to do it: see *Carltona Ld.* v. *Commissioners of Works*,[1] and *Metropolitan Borough and Town Clerk of Lewisham* v. *Roberts*[2]; but here not even those words were used, and in the absence of them the procedure was irregular, to say the least. There is some virtue in expecting a civil servant, when duly authorized, to use the words "I "am directed by the Minister" and so forth: for that should bring home to him the significance of what he is doing and should make him realize that if he does anything wrong he will be implicating the Minister. The words may have some legal significance too. Suppose, for instance, that in this case Mr. Comins had written a letter of appointment professing to act on behalf of the Minister, then, even though he had no authority in fact to write the letter, the Minister could have ratified his action. Indeed, the statutory certificate would have amounted to a ratification, because the Minister could not have given the certificate except on the footing that the tribunal had been validly appointed. But ratification is not admissible in law unless the agent professed to act on behalf of the principal: see the notes to *Armory* v. *Delamirie*[3] and *Keighley Maxsted & Co.* v. *Durant*.[4] So here, without some words by Mr. Comins professing to act on behalf of the Minister, there was nothing capable of ratification.

[1] [1943] 2 All E.R. 560.

[2] [1949] 2 K.B. 608; 65 T.L.R. 423; [1949] 1 All E.R. 815.

[3] (1722) 1 Stra. 504; 1 Smith's Leading Cases, 356, notes.

[4] [1901] A.C. 240; 17 T.L.R. 527.

How, then, does the matter stand? The root mistake was that no one was authorized to write a letter of appointment on the Minister's behalf, and no one did so. If a letter had been written on the Minister's behalf, everyone would have known where they stood. Mr. Marsh's question at the hearing would not have remained unanswered, and the chairman would not have made his unfortunate intervention. The absence of writing would no doubt only be an informality, but the absence of any actual or professed authority to appoint on behalf of the Minister was, I think, more than an informality. It was a defect which is fatal unless it is cured by the other provisions of the Act.

This brings me to paragraph 20 (2) of Schedule IX which says that " All acts done at any meeting of any such body shall, " notwithstanding that it is afterwards discovered that there was " a defect in the appointment or disqualification of a person " purporting to be a member thereof, be as valid as if that defect " had not existed." It seems to be that that paragraph exactly covers this case. The absence of authority in Mr. Comins was certainly a defect, but it was no more than a defect. It is not as if he was a mere meddler or intruder. He was a civil servant who was doing a task which it was very proper for a civil servant to do, namely, to discuss with the chairman the question as to who would be the suitable people to appoint from the panel, and then to ask them to sit. The only trouble was that the Minister did not specifically authorize him to make the appointment on the Minister's behalf and he did not purport to do so. It is not as if the wrong men were appointed to sit. The right men were appointed, but mistakes were made in the method of their appointment. That was a defect, but no more than a defect, and it was cured by the terms of the Act. Even if the chairman himself had appointed them, I should consider that, so long as they came from the panels, that would only be a defect which would be cured by the Act.

I cannot help remarking that it would be most unfortunate if we came to any other conclusion. The members of the land tribunals in the eastern province have been appointed in this way for several years. They have made decisions in a great many disputes and people have acted on the faith of their decisions. Indeed, we have had cases in this court where these tribunals have given consent to notices to quit by landlords to tenants; and many landlords have recovered their lands on the basis that the decisions are valid: see *Martin-Smith* v. *Smale*.[5] If all the decisions were now invalidated by a technical defect, it would produce great confusion and injustice. It is just the thing which paragraph 20 (2) was made to avoid.

That is sufficient to decide this case, but I go on to consider the position on the footing that the judge was right in thinking that the supposed tribunal was no tribunal at all. Even in that case, the Minister has still a powerful defence at his disposal. He says that he has given his statutory certificate certifying that it is necessary that the land should be retained by him: and that, whatever was done wrong before it was given, his certificate cannot now be questioned in courts. He says that Mrs. Woollett had six weeks in which to question the certificate. The six weeks started to run on October 4, 1952, when she was served with notice of the certificate, and expired on November 17, 1952. It is clear that Mrs. Woollett cannot be blamed for not acting within the six weeks. No one told her about it. The Minister gave her no notice that she was subject to the time limit, and she can hardly have been expected to find out for herself. Nevertheless, as she did not act within that time, the Minister says that she is not able to challenge the certificate in the courts or to resist the compulsory purchase of her land.

I think that the Minister is right in his law on this point. The statutes which produce the result are exceedingly complicated and riddled with cross-references. I will not embark on the tedious task of construing them. Suffice it to say that the certificate has effect as if it was a compulsory purchase order, and as such it is protected by the Acquisition of Land (Authorization Procedure) Act, 1946, Schedule I, Part IV, paragraphs 15 and 16, which say that a compulsory order shall not "be questioned in "any legal proceedings whatsoever" except within six weeks of notice being given. However much disposed we might have been to question the Minister's certificate, the plain words of the statute forbid us to do so. We cannot even extend the time. I admire the ingenuity with which Mr. Marshall endeavoured to escape from this result, but I fear that there is no escape. Mrs. Woollett is caught in the net of the statute.

There was one other point: it was suggested that the statutory certificate was not validly issued by the Minister on his behalf; but this point failed on the evidence of Mr. Garside that he was duly authorized.

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[5] [1954] 1 W.L.R. 247; [1954] 1 All E.R. 237.

This brings me to the end of the case. It is no doubt hard on Mrs. Woollett to have her little piece of land taken from her. She spent much money in the reasonable expectation that it would be released to her, only to find afterwards that the Minister decided to retain it. But there is nothing that can be done about it. The Minister has certified that it is necessary for him to retain the land and no one can say him nay. In my opinion the appeal should be allowed and judgment entered for the Minister.

JENKINS L.J. The questions arising in this appeal are substantially these: (1) Was it competent to the Minister to authorize a member of the staff of his Ministry to exercise his power, or perform his duty, of appointing the two nominated members of the agricultural land tribunal under the provisions of paragraph 15 of Schedule IX to the Agriculture Act, 1947? (2) If so, was Mr. Comins authorized by the Minister to exercise that power or perform that duty? (3) If so, did Mr. Comins in pursuance of that authority appoint for the reference here in question the two nominated members who with the chairman formed the tribunal by which this reference was heard? (4) If the answer to all or any of the foregoing questions is in the negative, were the acts of the tribunal so constituted nevertheless validated by the provisions of paragraph 20 (2) of Schedule IX to the Agriculture Act, 1947? (5) Finally, was the plaintiff in any case precluded from bringing this action by the joint effect of section 92 of the Agriculture Act, 1947, and paragraphs 15 and 16 of Part IV of Schedule I to the Acquisition of Land (Authorization Procedure) Act, 1946, inasmuch as the period of six weeks within which any application to the court must be made under paragraph 15 aforesaid had long since expired when she issued her writ in this action?

To consider these five questions in the above order:—

(1) It was not disputed that it was competent to the Minister to authorize a member of the staff of the Ministry to exercise his power, or perform his duty, of appointing the nominated members of the tribunal. That question is settled, so far at all events as this court is concerned, by *Carltona Ld.* v. *Commissioners of Works.*[6]

(2) The effect of Mr. Comins' evidence bearing on his authority to appoint the nominated members of the tribunal on behalf of the Minister may be thus summarized: [His Lordship

[6] [1943] 2 All E.R. 560.

then stated the facts set out above in relation to Mr. Comins' status and the prevailing practice in appointing nominated members to the tribunals in the area, and continued:] What is one to make of this evidence? It is surprising that no document could be produced conferring on Smithies or on Comins the Minister's authority to appoint the nominated members of the tribunal. On the other hand, it is clear that Comins, and Smithies before him, consistently took it on themselves with respect to each and every reference to arrange for two of the persons on the panel to sit as nominated members of the tribunal; and it must be assumed that their superiors in the Ministry knew that they were doing this. Smithies and Comins either had or did not have the Minister's authority to appoint those nominated members. If they did have the Minister's authority then cadit quaestio so far as this part of the plaintiff's case is concerned. If they did not have the Minister's authority, then their superiors in the Ministry either completely misapprehended the effect of paragraph 15 of Schedule IX to the Act, or else knowingly permitted Smithies and Comins to act in a wholly irregular manner.

I find nothing in Comins' evidence which makes it necessary to impute to responsible officials of the Ministry charged with the implementation of the provisions of the Act of 1947 such ignorance of the terms of the Act with which they were dealing or, alternatively, such a dereliction of duty. It may well have been decided at a high level in the Ministry that the officer or servant of the Ministry appointed to the office of secretary to an agricultural land tribunal should exercise the power or perform the duty conferred or imposed on the Minister by paragraph 15 of Schedule IX of appointing for each reference to the tribunal the two nominated members of the tribunal required by that paragraph. Such a decision, coupled (to take the case of the particular agricultural land tribunal here in question) with instructions to Smithies that he was to act as secretary of the tribunal and was to appoint for each reference to the tribunal the two nominated members required by paragraph 15 of Schedule IX would, I apprehend, constitute a sufficient authorization to Smithies to make these appointments on the Minister's behalf. Further, such a decision, followed by instructions to Smithies to the above effect, and action by him in accordance with those instructions during his tenure of office as secretary to the tribunal, and followed later by instructions to Comins to take over from Smithies the office of secretary to the tribunal and to carry on as Smithies had done in relation to the tribunal, would constitute a sufficient authorization to Comins to make the necessary appointments of nominated members. I do not think that it would have been essential to the effective authorization of Smithies or Comins that they should have been told in so many words that they were to make these appointments on the Minister's behalf. If they were simply told that they were to appoint—or for that matter to choose or select, though much play was made with the distinction between these three expressions—the nominated members for each reference, it would be manifest from the terms of paragraph 15 of Schedule IX (with which they and their superiors must be assumed to have been familiar) that the intention was that they were to exercise or perform the Minister's power or duty of appointing the nominated members under paragraph 15, for no power or duty in that behalf is assigned by that paragraph or any other provision of the Act to anyone but the Minister. I conclude, therefore, that it was possible for Comins to have been effectively authorized to exercise or perform the Minister's power or duty of appointing the nominated members without ever having been told either orally or in writing expressly or specifically that he was authorized to make these appointments on the Minister's behalf. Accordingly, I cannot regard Comins' inability to point in his evidence to any document or conversation expressly or specifically authorizing him to appoint the nominated members on the Minister's behalf as necessarily showing that he had no such authority, and I think that he must be taken to have been effectively authorized to do so. I am fortified in this view by *Metropolitan Borough and Town Clerk of Lewisham* v. *Roberts*,[7] where the defendant questioned the authority of one O'Gara, a member of the staff of the Ministry of Health, to write on the Minister's behalf a letter delegating to the town clerk of Lewisham the Minister's functions under regulation 51 of the Defence (General) Regulations, 1939, for the purposes of requisitioning a particular building. O'Gara gave evidence in the county court to the effect that he had never been expressly or specifically authorized to write such letters of delegation of requisitioning powers, but that it had been part of the duties of his predecessor in the position in the Ministry held by him at the material time, and that he had simply taken over from his predecessor and continued to do as his predecessor had done, writing as many as ten such letters a week. On this

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[7] [1949] 2 K.B. 608.

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evidence it was contended for the defendant that O'Gara should be held to have had no authority to write the letter in question; but that view was rejected both by the county court judge and in this court. O'Gara's evidence is not fully set out in the report of the case, but I was a member of the court which heard the appeal and have the effect of his evidence well in mind; and I think it affords a striking parallel to Comins' "take over" from Smithies in the present case.

(3) The next question is whether Comins did, in pursuance of the authority which, in my view, he should be taken to have possessed, appoint the two nominated members who sat with the chairman of the tribunal to hear the reference with which we are now concerned. The course of procedure followed by Comins was eminently practical but decidedly informal.

[His Lordship then stated the evidence relating to the particular practice followed in making the appointments of the two nominated members in the present case, as set out above, and continued:] In the result, the tribunal which sat to hear the reference in this case was to all appearances properly constituted, consisting as it did of the chairman and two nominated members, one from the persons on the panel nominated by the National Farmers' Union, and the other from the persons on the panel nominated by the Central Landowners' Association; and in all probability the validity of its constitution would never have been challenged, and the present litigation would never have ensued, had it not been for the unfortunate reply made by the chairman to the intervention of the Rev. Eric Marsh, who attended the reference as chairman of the Farmers and Smallholders' Association. [His Lordship set out the evidence of what took place at the hearing, as stated above, and continued:] I find it a little difficult to believe that the chairman did actually say that he appointed the nominated members. But the judge accepted Mr. Marsh's evidence in preference to that of the chairman, and I think it must be assumed that whatever his exact words the chairman did use language which Mr. Marsh and Mr. Woollett understood, and reasonably understood, as amounting to an assertion that he (the chairman) had appointed the nominated members. That, of course, if true, would have been a manifest departure from the provisions of the Act. On the other hand, if the truth was that Comins, having the necessary authority, had in fact appointed the nominated members, an untrue assertion by the chairman that he (the chairman) had done so would be immaterial. But the importance of the part played by this episode in the history of the case is brought out by the fact that the allegation in the statement of claim was that "the tribunal "was not validly constituted in that the members of the tribunal "other than the chairman, Sir Cecil Oakes, were not appointed "by the Minister in accordance with the provisions of the Act "but were nominated and appointed by Sir Cecil Oakes."

It is to my mind quite clear on the evidence that the nominated members were not in fact appointed by Sir Cecil Oakes, who, in a few cases only, though as it happens in the cases of both the two nominated members with whom we are here concerned, was merely asked by Comins whether he approved the persons whom Comins proposed to invite to sit for the purposes of some particular reference. It remains to consider whether on the footing that (as I have held above) Comins must be taken to have had authority to appoint the nominated members, his informal procedure above described did amount to appointing them within the meaning of the Act. I think it did. Given that Comins had the authority to appoint, I think that his invitations to persons on the panel to sit, followed by their agreeing to do so and in fact sitting, did have the effect of appointments of the persons concerned as nominated members, although the actual word "appoint" may never have been used. Much play was made in the course of the argument with the distinction between "choosing" or "selecting" and "appointing." To my mind, in relation to what had to be done under paragraph 15 of Schedule IX, there is really nothing in this distinction. Appointment was limited to a panel of busy men serving without remuneration (as distinct from expenses) and under no obligation to sit unless they chose. The problem was to find eligible persons who were prepared to sit on any given reference, and from a practical point of view Comins' method of finding nominated members was the natural one to adopt. It was argued that the appointment of a person to sit as a member of a judicial tribunal such as this was a solemn act requiring due formality in its performance. This, I think, overlooks the fact that the choice of nominated members was limited to a panel so picked as to secure that the persons named in it were representative of the interests of farmers and of owners of agricultural land, and further limited by the provision which required that one from each of these two categories should be appointed for every reference. The task of appointment thus really resolved itself into finding two eligible persons who would be available to sit on a given day, the conditions of eligibility being such as to

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ensure that on each occasion one of the nominated members would be representative of the interests of farmers, and the other representative of the interests of owners of agricultural land. An argument was founded on Comins' practice of confirming that a given person had agreed to sit by a letter on notepaper headed with the name and address of the tribunal and signing himself as secretary, and it was suggested that this showed that Comins thought that he was appointing (or selecting) the nominated members on behalf of the tribunal as distinct from the Minister. Given that he did in fact have authority to appoint the nominated members on behalf of the Minister, I cannot regard this point as of any substance. Accordingly, I hold that if, as in my view must be taken to be the case, Comins had authority to appoint the nominated members on behalf of the Minister he did pursuant to that authority appoint them within the meaning of paragraph 15 of Schedule IX.

(4) If I am right so far, it follows that the Minister is entitled to succeed in this appeal without recourse to paragraph 20 (2) of Schedule IX to the Act of 1947. But if I am wrong, and Comins was not effectively authorized to appoint the nominated members, or, being so authorized, failed through the informality of his procedure in this regard to appoint them effectively, it seems to me that these shortcomings could properly be classed as "defects" in the appointments of nominated members within the meaning of paragraph 20 (2). Clearly the Ministerial intention was that the nominated members should be appointed in accordance with paragraph 15 of Schedule IX. Clearly it was believed by Comins' superiors in the Ministry that he had been empowered to appoint them in accordance with that paragraph, and that nominated members appointed by him would be duly appointed members of the tribunal for the purpose of the Act. Nothing was done which could not have been done in strict conformity with the Act, and the composition of the tribunal so far as the qualification of the nominated members was concerned accorded with the requirements of the Act. The informality of Comins' procedure involved no aberration of substance. There is not and could not be any charge of mala fides on the part of the Minister or anyone in the Ministry. Accordingly, I think that the acts of this tribunal were in any case validated (if and so far as they may have been in need of validation) by paragraph 20 (2) of Schedule IX.

(5) Even if all the conclusions above expressed are wrong, it seems to me that the combined effect of section 92 of the

Agriculture Act, 1947, and paragraphs 15 and 16 of Part IV of Schedule I to the Acquisition of Land (Authorization Procedure) Act, 1946, must be fatal to the plaintiff's case. [His Lordship read section 92 of the Act of 1947 and paragraphs 15 and 16 of Part IV of Schedule I to the Act of 1946, and continued:] The combined effect of these enactments appears to be that the Minister's certificate under section 85 of the Act of 1947 is to be treated for the purposes of paragraphs 15 and 16 of Part IV of Schedule I to the Act of 1946 as if it was a compulsory purchase order and that service of notice of the giving of the certificate is to be treated for those purposes as if it were the first publication of notice of the making of an order, and that references to the requirements of Schedule I to the Act of 1946 are to be treated as references to the requirements of the Act of 1947.

The result, in my judgment, is that under paragraph 15 of Part IV of Schedule I to the Act of 1946, as applied by section 92 of the Act of 1947, the plaintiff in this case had six weeks from the service on her of notice of the giving of the Minister's certificate under section 85 of the Act of 1947 within which to apply to the court for the purpose of questioning the validity of the certificate "on the ground that the authorization of a "compulsory purchase thereby granted" was "not empowered "to be thereby granted under" the Act of 1947; and that, under paragraph 16 of the same part of such schedule, subject to the provisions of paragraph 15, a certificate under section 85 of the Act of 1947 cannot be questioned in any proceedings whatsoever. The relevant period of six weeks had admittedly expired in this case long before the writ in this action was issued, and accordingly this action is barred by the plain effect of paragraph 16 of Part IV of Schedule I to the Act of 1946 as applied to section 85 of the Act of 1947 by section 92 of the Act of 1947.

The argument that paragraphs 15 and 16 of Part IV of Schedule I to the Act of 1946 cannot be intended to apply where the certificate is a mere nullity seems to me to be misconceived. The point is that, subject to the right of applying to the court under paragraph 15 within the prescribed period of six weeks, paragraph 16 imposes an absolute bar to all litigation, including litigations designed to establish a contention to the effect that the certificate is a nullity. It is a bar which operates in limine, irrespective of the nature of the objections sought to be advanced.

I need not consider the plaintiff's subsidiary contentions to the effect that the certificate was void because it was not made

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by the Minister personally but by the Minister acting through an official of the Ministry named Garside, and because it related to the land of various persons in addition to the plaintiff's land. The judge in my view rightly rejected these contentions, of which the first was not pressed and the second was not even opened before us.

While I have reached a different conclusion from the judge and think that the Minister's appeal should succeed, I cannot part from this case without saying that this litigation seems to me to have been largely caused by the absence of any adequate method or system in the arrangements made by the Ministry for the appointment of nominated members of agricultural land tribunals. It is not the function of this court to advise Ministers how the duties of their departments should be carried on, but it seems to me that this litigation would, in all probability, have been avoided, or at all events much curtailed, if the Ministry had adopted the simple practice of giving written instructions to the following effect to any official appointed to the office of secretary to a tribunal: "(1) In addition to acting as secretary "to the tribunal you will on behalf of the Minister appoint for "every reference the two nominated members in accordance with "paragraph 15 of Schedule IX to the Agriculture Act, 1947; "(2) You will before the tribunal enters on any reference furnish "to each nominated member appointed for that reference a "letter signed by yourself to the effect that you on behalf of the "Minister thereby appoint him to be a nominated member of "the tribunal for the purposes of that reference." As an alternative to (2) above, the secretary could have been provided with a common form letter of appointment for him to complete and sign and give to each nominated member for any reference.

It is obvious that if a regular procedure on the above lines had been adopted, the Minister would have had ready to hand a short, complete and convincing answer to attacks on the validity of the constitution of the tribunal such as those made in the present case. Moreover (and this, too, is important), the victims of compulsory purchase could by such means have been readily satisfied that the tribunal on whose judgment the fate of their land depended had been appointed strictly in accordance with the relevant law.

This, however, is by the way, for while I cannot regard the present case as reflecting any credit on the efficiency of the Ministry, the result in my opinion is that, for the reasons I have endeavoured to state, this appeal should be allowed.

Morris L.J. This case illustrates the importance of ensuring, in cases where by statute there is a duty of appointing a person to an office or to perform certain functions, that there should be such measure of formality, even though not expressly required by statute, as will avoid doubt as to whether an appointment has been made or as to when and by whom and in what manner it has been made. An agricultural land tribunal has very important functions. Under the provisions of Schedule IX to the Agriculture Act, 1947, which applied to this case, there was a requirement that the two nominated members should "for each reference to "the tribunal, be appointed by the Minister," with a further requirement that one of the two should be appointed from a panel of persons nominated by persons appearing to the Minister to represent the interests of farmers, and that the other should be appointed from a panel of persons nominated by persons appearing to the Minister to represent the interests of owners of agricultural land. There is no doubt that nominations to the panels were made in accordance with statutory requirements. Two panels came into existence. Included in one panel was the name of Mr. Elliott: included in the other was the name of Mr. Soper. It was therefore perfectly competent for the Minister to have appointed these two gentlemen to be members of the agricultural land tribunal to deal with the "reference" to the tribunal which was required by the plaintiff in accordance with section 85 (5) of the Act of 1947. These two gentlemen in fact sat: they sat with a chairman duly qualified and duly appointed. They were requested to sit, to use a neutral expression, by Mr. Comins: from him they received in advance the documents referable to the matters on which they were to adjudicate and which they were to determine. There is nothing to suggest that they thought otherwise than that everything was in order. There is nothing whatsoever to suggest that when the chairman and these two gentlemen applied themselves to the issues presented for their consideration they were in any way influenced by anyone: there is no room for any suspicion that they acted other than impartially, judicially, and with complete independence. When, therefore, the point is taken that though the two gentlemen were qualified to be "appointed" for the reference in question, and though they were requested to sit, yet they were not "appointed "by the Minister" in compliance with the Act, this might at first seem to be rather a bare technical point not sponsored by merits. But though there does not lurk in this case any element of high-handed conduct, yet the matters raised are of much consequence. Where individual rights are in issue, it is of far-reaching importance that the requirements of law as laid down by Parliament should be faithfully observed.

The determination of the question whether there was an appointment by the Minister must depend on what was done. Statements as to what anyone may have thought cannot affect the matter save to such extent, if any, as they may throw light on what was done. When the Rev. Marsh intervened at an early stage in the proceedings of the tribunal, he had the point in mind that it was a proposal of the Minister that was in issue before the tribunal, and that by statute it was the duty of the Minister to appoint two members of the tribunal. That intervention may have been designed to point out what the statute provided and to suggest that there was some unfairness in the enacted procedure. It seems to have been based on the view that if a Minister appoints certain members of a tribunal, such members are likely to decide in a way which they think might be acceptable to the Minister. This, I think, involves a wholly unwarrantable assumption and, though perhaps unintentionally, also involves an implication against the integrity of persons whom a Minister may appoint. The answer to the inquiry of the Rev. Marsh that might have been expected would have been: (*a*) that the appointments had been made by the Minister; (*b*) that the Minister had appointed from among the nominated members of the two panels; (*c*) that this had to be so by law, and (*d*) that resentment was felt at the implication that the nominated members appointed by the Minister were not there to decide fairly and with judicial impartiality. Instead of this, it is found that the recollection of the Rev. Marsh is that the chairman said: "Mr. Marsh, this has no more to do with the "Minister of Agriculture than it has with you. I appointed "the two nominated members," while the recollection of the chairman is that he said that it was he who had in that particular case chosen or selected the two members. The chairman denied that he had used the word "appointed" or had said that he had appointed the two members. The secretary does not appear to have made any statement: had the secretary said that the Minister acting through his servants had made the appointments, the inquiry made by Mr. Marsh would have been satisfactorily answered. Had there been an appointment by the Minister contained in or evidenced by some document (even though writing is not by the provisions of Schedule IX made expressly requisite) then it would have been so easy to reply to the inquiry of Mr. Marsh. The evidence as to what happened, and particularly the evidence as accepted by the judge, leads me to the view that in the arrangements which resulted in the presence of Mr. Elliott and Mr. Soper there was forgetfulness of the provisions of paragraph 15 of Schedule IX.

It is said on behalf of the Minister that there is no evidence that the two members were not appointed by the Minister; it is said that Mr. Comins acting for and on behalf of the Minister appointed them; it is further said that there is room for the application of the maxim " Omnia praesumuntur rite esse acta." At the close of the evidence called for the plaintiff in the court below, there was no submission that there was no case to answer. No criticism of anyone can be made because of this, and, indeed, it would have been a matter for regret if in a case of this kind evidence had not been submitted to the court. In the very proper exercise of discretion, evidence on behalf of the defendant was called. Mr. Comins was among the witnesses. In the result, therefore, the court had before it not only the documents but the testimony of Mr. Comins who gave his account of what had been done. It then fell to the court, after having ascertained the facts, to decide their interpretation. The maxim to which I have referred cannot be used to assert that everything has been regularly done if the facts are ascertained, and, when ascertained, show that everything has not been regularly done.

It is quite possible from the evidence of Mr. Comins to form a clear view as to the way in which the tribunal came into being. The judge made it very plain that from first to last there has been no kind of hint or suggestion against the good faith and integrity of Mr. Comins. As a witness he was " perfectly, transparently accurate and careful."

[His Lordship stated the facts as to Comins' dual capacity and his requesting Soper and Elliott to sit, and continued:] In regard to the consultations between Mr. Comins and the chairman, it does not seem to me that they show that the chairman did more than approve of the course which Mr. Comins had in mind and I do not think that there was anything inappropriate or irregular in seeking and considering the opinion of the chairman. The evidence of Mr. Comins must be read as a whole and considered as a whole. Some questions and answers may, however, be noted.

[His Lordship read extracts from the evidence of Comins relating to his practice in getting members on the panels to sit on the tribunal, and continued:] I consider that it is essential not to isolate any parts of Mr. Comins' evidence, but to read it in its entirety. Having endeavoured to do so, I have formed the conclusion that what happened was that when Mr. Comins made arrangements for the presence of Mr. Elliott and Mr. Soper he purported to be functioning in his capacity as the secretary of the tribunal. When, after those two gentlemen had received telephone messages from Mr. Comins, they agreed to sit, Mr. Comins in his capacity as secretary of the tribunal wrote letters of confirmation to them. The fact that it was in his capacity as secretary of the tribunal that Mr. Comins confirmed the acceptance is evidence of the capacity in which the invitations which met with acceptances were issued.

It is said that, as a tribunal consists of a chairman and of two members appointed for the particular reference, Mr. Comins could not act as secretary of the tribunal until it was constituted by the appointment of the two nominated members. It is said that Mr. Comins must have been acting other than as secretary of the tribunal and that he must in the result have been acting for the Minister, even though he may not have realized it. It is submitted, therefore, that the Minister made the appointments. But it is provided by section 73 (1) of the Agriculture Act, 1947, that the Minister is to constitute areas and that "for "each area so constituted there shall be established an Agri-"cultural Land Tribunal, which shall be charged with the duty "of determining matters referred to them under this Act." Further, by paragraph 22 (2) of Schedule IX the Minister is required to attach such officers and servants to agricultural land tribunals as he may, with the approval of the Treasury, determine to be required. Though the tribunal has to be constituted for each reference, there is a tribunal which is established: it has a chairman, who holds office for three years, and a secretary, who is attached.

When Mr. Comins was in communication with Mr. Elliott and Mr. Soper, he was, in my judgment, purporting to act as the secretary of the tribunal. He did not state that he was acting on behalf of the Minister and did not purport to act on behalf of the Minister: and it would not seem that he gave thought as to whether or not he was acting on behalf of the Minister. The matter must, however, depend on determining what was, in fact, done and what was the effect of what was done, and what anyone thought cannot be decisive. [His Lordship referred to the circumstances in which Comins had taken over the duties as secretary of the tribunal, and continued:] In this connexion it is to be observed that it is for the Minister to decide which bodies appear to represent the interests of farmers and of the owners of agricultural land respectively. The Minister did so decide. Then it was for those bodies to nominate persons to the panels. Those nominated are, therefore, not chosen by the Minister, but are independently chosen. Once they have been independently chosen they are all on an equality, and it is not to be supposed that some are to be deemed to be better qualified than others. The appointment of one from each panel to sit to determine a reference is not, therefore, in the scheme as laid down a step of very special or particular importance. There would be nothing surprising in assigning to someone of the status of Mr. Comins the duty of being the delegate of the Minister, within the internal administration of the Ministry, to cause appointments to be made by and in the name of the Minister. If those acting for the Minister deputed Mr. Comins to be the official to make appointments to the tribunal, then no complaint can be made to the court in regard to this. In *Carltona Ld.* v. *Commissioners of Works*[8] Lord Greene M.R. said[9]: "In the administration of "government in this country the functions which are given "to ministers (and constitutionally properly given to ministers "because they are constitutionally responsible) are functions so "multifarious that no Minister could ever personally attend to "them. To take the example of the present case no doubt "there have been thousands of requisitions in this country by "individual ministries. It cannot be supposed that this regulation meant that, in each case, the Minister in person should "direct his mind to the matter. The duties imposed upon "ministers and the powers given to ministers are normally "exercised under the authority of the ministers by responsible "officials of the department. Public business could not be "carried on if that were not the case. Constitutionally, the "decision of such an official is, of course, the decision of the "Minister. The Minister is responsible. It is he who must "answer before Parliament for anything that his officials have "done under his authority, and, if for an important matter "he selected an official of such junior standing that he could "not be expected competently to perform the work, the Minister "would have to answer for that in Parliament. The whole

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[8] [1943] 2 All E.R. 560.

[9] Ibid. 563.

"system of departmental organization and administration is "based on the view that ministers, being responsible to Parlia- "ment, will see that important duties are committed to "experienced officials. If they do not do that, Parliament is "the place where complaint must be made against them." The duty is one that might well be delegated to the officer of the Ministry who is selected to act as secretary of the tribunal. Indeed, this seems to have been the effect of what took place. Mr. Comins was told to carry on the procedure which was being followed prior to his succeeding Mr. Smithies. Mr. Comins thought that he was doing his duty.

[His Lordship referred to the pleadings on behalf of the Minister and in particular to the defence that the authority of Comins to act was not expressly conferred on him either orally or in writing, but that Comins made the appointments in the course of his duties as assistant land commissioner on the staff of the defendant and in accordance with the prevailing practice, and continued:] The evidence of Mr. Comins supports the view that he did follow the "prevailing practice," and that he was instructed and required by his superior to do so. This must, I think, mean that he was told that he must convene a tribunal in the way that had been usual and in doing so in this instance he was therefore doing as he was instructed to do. But it appears to me that the instructions given were lacking in precision and ought to have been more ample. It is because of this that there was a forgetfulness of the provisions of paragraph 15 of Schedule IX. If this paragraph had been in mind, I feel confident that there would have been some communications in writing (even though writing is not expressly stipulated for) addressed in the name of the Minister informing Mr. Elliott and Mr. Soper that they had been appointed by the Minister: furthermore, I consider that there would after the question of the Rev. Marsh have been an intervention by Mr. Comins which would completely have explained and clarified the position.

The view of the evidence which I have formed is that the Minister, acting by and through his servants in the Ministry, permitted and authorized the procedure which became the prevailing practice, under which it was left to that officer of the Ministry who was deputed to be secretary of the tribunal to convene or constitute the tribunal from time to time, which meant appointing in the name of the Minister the two nominated members. The instructions to such person were, however, so general and so imprecise as to make possible a situation like the one now under review, with all its doubts and difficulties. One view of the result is that the authority given to Mr. Comins was such that acting for the Minister he did in fact appoint Mr. Elliott and Mr. Soper, although he may not fully have appreciated the effect of what he did. But the view of the matter which I have formed is that though Mr. Comins was endowed with the authority to act on behalf of the Minister to make appointments for a reference, and though Mr. Comins did appoint Mr. Elliott and Mr. Soper for the particular reference, in the actual appointing Mr. Comins acted in his capacity as secretary of the tribunal. He really had two capacities, and through inadequate instruction or coaching he did not sufficiently distinguish between the two. In one capacity he was agent of the Minister; in another he was secretary of the tribunal. In the former he could and should have made appointments of nominated members to deal with a reference; in the latter capacity he would have communicated with the nominated members after appointment.

In my view it would be unreal to hold that Mr. Elliott and Mr. Soper were not appointed at all: they were asked to sit and they did so. They were asked by someone who, in fact, had a delegated authority from the Minister: when that delegated authority was exercised, it was exercised in an erroneous manner. Communications were made in the capacity of secretary of the tribunal when they should have been made in the capacity, which in fact was possessed, even though this may have been imperfectly appreciated, of agent of the Minister.

At most there was some defect in the method of making an appointment, and in my judgment any defect that existed in this case was a " defect in the appointment " as that phrase is used in paragraph 20 (2) of Schedule IX, which provides that all acts done at any meeting of (inter alia) an agricultural land tribunal " shall, notwithstanding that it is afterwards discovered " that there was a defect in the appointment or disqualification " of a person purporting to be a member thereof, be as valid as " if that defect had not existed."

I do not think that it can be doubted that the Minister did issue a certificate under section 85 (2) of the Agriculture Act, 1947—which certificate as a certificate cannot be regarded as being void or a nullity. The provisions of section 85 (4) met with compliance. Then there was the reference to the agricultural land tribunal. Thereafter was the sitting of the tribunal. The tribunal purported to determine the matters specified in section

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74 (2) of the Act of 1947. Subject only to the issue as to whether the tribunal was validly constituted, there was observance of the provisions of sections 74 (3), (4) and (5). There came into existence, therefore, a certificate apparently regular and in order which purported to be a certificate issued under section 85 (2). The provisions of section 92 of the Act, therefore, became applicable, and by subsection (2), the certificate had "effect as "if it were a compulsory purchase order made under section "one" of the Acquisition of Land (Authorization Procedure) Act, 1946; that means, as though it had been made in accordance with the provisions of Schedule I to the Act of 1946. But by paragraph 15 of Schedule I there are certain rights of questioning the validity of a compulsory purchase order. It can be questioned on the ground that the authorization of a compulsory purchase order is not empowered to be granted under the Act of 1946. But furthermore (a) any person aggrieved by a compulsory purchase order, and (b) any person aggrieved by a certificate under Part III of Schedule I of the Act of 1946, may question the validity of the order or certificate on the ground that any requirement of the Act of 1946, or any regulation made thereunder, was not complied with in relation to the order, or the certificate, as the case may be. Such questioning may be by application to the High Court within six weeks from the "date "on which notice of the confirmation or making of the order or "of the giving of the certificate is first published in accordance "with the provisions" of Schedule I.

The result, in my judgment, is that it was open to the plaintiff (as a person aggrieved by a compulsory purchase order) to question the validity of the order (the certificate under section 85 (2) having effect as a compulsory purchase order) on the ground that the requirements of the Act of 1947 as to the proceedings to be taken before the giving of the certificate under section 85 (2) were not complied with. It was open to her to question the validity of the order within six weeks from the service of notice of the giving of the certificate under section 85 (2). The plaintiff could have questioned the validity of the order on the ground that there was no proper tribunal constituted and that there was accordingly no hearing, and that as a result there had not been satisfaction of the requirements of the Act of 1947 as to the proceedings to be taken before the giving of the certificate under section 85 (2). But the plaintiff did not question the validity of the order within six weeks, and paragraph 16 of Schedule I of the Act of 1946 provides that which has already been read. The result follows that the plaintiff was not in this action entitled to question the compulsory purchase order which became operative as from the service of the notice of the giving of the certificate. For these reasons the plaintiff should, in my judgment, have failed in her action.

Appeal allowed.
Judgment for the Minister.
Leave to appeal to the House
of Lords granted.

Solicitors: *Solicitor, Ministry of Agriculture and Fisheries; Lucien Fior.*

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Lord Goddard C.J., Lynskey and Ormerod JJ.

REGINA *v.* NATIONAL INSURANCE COMMISSIONER. *Ex parte* TIMMIS.
REGINA *v.* SAME. *Ex parte* COX.
REGINA *v.* SAME. *Ex parte* JAMES.

National Insurance—Sickness benefit—"Detention in legal custody"—Mental defective—Person of unsound mind—Person detained in mental homes as a result of criminal proceedings—Whether disqualified from receiving benefits—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 24, 66—*National Insurance Act,* 1946 (9 & 10 *Geo.* 6, *c.* 67), *s.* 29 (1) (*b*).

The three applicants, T. C. and J., having committed criminal offences, were detained in hospitals or mental institutions pursuant to court orders. In the case of T., the magistrates, being satisfied that he was of unsound mind, made an order for his detention under section 24 of the Criminal Justice Act, 1948. In the cases of C. and J., who were found to be mental defectives, the orders were made by courts of quarter sessions under the Mental Deficiency Act, 1913. On applications for orders of certiorari to quash decisions of the National Insurance Commissioner that the applicants were not entitled to sickness benefits under the National Insurance Act, 1946, by reason of the provisions of section 29 (1) (*b*), which excepts a person from benefit if he was "undergoing penal servitude, "imprisonment or detention in legal custody":—

Held that, since the applicants were in custody by virtue of decisions and orders of competent courts, they were detained "in "legal custody" within the meaning of section 29 (1) (*b*); and, accordingly, during the time that the applicants were in custody they were disqualified from receiving sickness benefit.

Held also, that in the case of an order made under section 24 of the Criminal Justice Act, 1948, the question whether a person was disqualified from receiving benefit was put beyond doubt by the provisions of section 66 of that Act.

Quaere: Whether there would be any difference if the applicants were detained under summary reception orders which were not made as a result of criminal proceedings.

APPLICATIONS for orders of certiorari.

Joseph Timmis on February 12, 1953, was charged before a court of summary jurisdiction with assault occasioning actual bodily harm. Pursuant to section 24 of the Criminal Justice Act, 1948,[1] the magistrates made the following order, which, after reciting that they were satisfied that he did the act complained of, stated: " . . . the court having heard the evidence of two duly "qualified medical practitioners . . . is satisfied that the said "Joseph Timmis is of unsound mind and is a proper person to be "detained. It is ordered that the said Joseph Timmis be received "and detained in Shelton Hospital . . . and that he be conveyed "thereto by the duly authorized officer of the Salop County "Council (or a constable of the County of Salop)."

Henry John Cox and Aneurin James were charged on February 22, 1923, and July 2, 1951, respectively, before courts of quarter sessions with offences for which they were convicted on their own confessions, and being found to be feeble-minded persons and therefore defectives within the meaning of the Mental Deficiency Act, 1913, were ordered to be sent to specified hospitals pursuant to section 8 (1) (*b*) of that Act.

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[1] Criminal Justice Act, 1948, s. 24: "(1) Where a person is charged "before a court of summary jurisdiction with any act or omission as "an offence punishable on summary "conviction with imprisonment, and "the court—(*a*) is satisfied that the "person did the act or made the "omission charged; and (*b*) is satisfied on the evidence of at least two "duly qualified medical practitioners "that the person is of unsound mind; "and (*c*) is also satisfied that he is a "proper person to be detained, the "court may, in lieu of dealing with "him in any other manner, by order "direct him to be received and detained in such institution for persons of unsound mind as may be "named in the order, and may "further direct the duly authorized "officer of the local health authority "in whose area the court is situated, "or any constable, to convey the "person of unsound mind forthwith "to that institution; and the provisions of the Lunacy and Mental "Treatment Acts, 1890 to 1930, shall "have effect as if an order made "under this section were a summary "reception order made under section "sixteen of the Lunacy Act, 1890."
S. 66: "Any person required or "authorized by or under this Act to "be taken to any place or to be kept "in custody shall, while being so "taken or kept, be deemed to be in "legal custody; and a constable, "while taking or keeping any such "person as aforesaid, shall have all "the powers, authorities, protection "and privileges of a constable as well "beyond his constablewick as within "it."

Local insurance officers acting under the National Insurance Act, 1946, declined to allow the applicants to receive sickness benefits under the Act on the ground that they were disqualified from receipt thereof as being persons "undergoing penal servitude, "imprisonment or detention in legal custody" within the meaning of section 29 (1) (*b*)[2] of the Act. The applicants appealed to local tribunals constituted under the Act, which dismissed the appeal in the case of Timmis and allowed them in the cases of James and Cox.

On the hearing of appeals from the tribunals' decisions, the National Insurance Commissioner (Sir David Davies Q.C.) held that all three applicants were disqualified from receipt of sickness benefit under the National Insurance Act, 1946, by reason of the provisions of section 29 (1) (*b*) on the ground that they were all undergoing "detention in legal custody."

The COMMISSIONER gave the following reasons (on December 29, 1953) for his decision in the case of Timmis. Having stated the facts he continued: The question for decision is whether, since his admission to the hospital, Timmis has been "detained in "legal custody" within the meaning of that phrase in section 29 (1) (*b*) of the National Insurance Act, 1946.

At first sight, section 66 of the Criminal Justice Act, 1948, might seem to conclude the question, for it provides that any person required or authorized by or under that Act "to be taken "to any place or to be kept in custody shall, while being so taken "or kept, be deemed to be in legal custody; . . ." In ordinary parlance there seems to be no distinction between directing that a person shall be "conveyed to" an institution and "received "and detained" there (which are the expressions used in section 24 (1) of the Act of 1948) and directing him to be "taken to" the institution and "kept in custody" there. However, the identical expressions "taken to" and "kept in custody" are used in sections 60 and 63 of the Act of 1948. It may be, therefore, that section 66 should be taken to refer only to the sections in which those identical expressions are used. I have therefore thought it right not to base my decision on section 66, but to attempt to ascertain the meaning of the expression "detention "in legal custody" without reference to that section.

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[2] National Insurance Act, 1946, s. 29: "(1) Except where regulations "otherwise provide, a person shall be "disqualified for receiving any benefit, and an increase of benefit shall "not be payable in respect of any "person as the beneficiary's wife or "husband, for any period during "which that person . . . (*b*) is undergoing penal servitude, imprisonment "or detention in legal custody."

I have not been able to find any statutory or judicial definition of the expression "legal custody," which does not appear to be a legal term of art. Earlier Acts, however, contained similar provisions to those of section 66 of the Act of 1948 to the effect that prisoners should be deemed to be in legal custody during periods when they were not within the prison in which they were confined pursuant to the sentence of the court: see section 28 of the Prison Act, 1877 (now replaced by section 13 (2) of the Prison Act, 1952), which deals with prisoners working outside the prison, and section 17 (6) of the Criminal Justice Administration Act, 1914 (now replaced by section 22 (2) of the Prison Act, 1952), which deals with prisoners who are sent from prison to hospital for treatment or an operation. In these enactments the expression "legal custody" seems to be intended to have the same meaning as the expression "lawful custody" in the introductory sentence of section 1 of the Prison (Escape) Act, 1742 (repealed by Schedule I to the Statute Law Revision Act, 1948), which is as follows: "For the further punishment of persons who shall aid "or assist prisoners to escape out of lawful custody . . ." It is interesting to observe that in the precedent of an indictment against a governor of a prison for the common law offence of a "voluntary escape" given in Archbold's Criminal Pleading, Evidence and Practice (33rd ed., at p. 1260), the defendant is described as "having the lawful custody" of the prisoner. It is also worthy of note that section 1 of the Act of 1742 applies not only to persons convicted of crime but to those "in gaol "upon any process whatsoever, for any debt, damages, costs, "sum or sums of money, amounting in the whole to the sum of "£100." All these instances of the use of the expression legal or lawful custody relate to persons detained in prison, though in the cases covered by section 1 of the Prison (Escape) Act, 1742, the detention need not have resulted from criminal proceedings: see *Reg.* v. *Allan.*[3] The effect of section 28 of the Prison Act, 1877, and section 17 (6) of the Criminal Justice Administration Act, 1914, is that, in the specified circumstances, the prisoners are still detained in legal (or lawful) custody, although they are outside the prison in which they were confined, in accordance with the sentence of the court which convicted them, so that the governor of the prison in whose "legal custody" they were deemed to be by virtue of section 58 of the Prison Act, 1865 (now replaced by section 13 (1) of the Prison Act, 1952), would not be liable to an action of false imprisonment. In my opinion the conclusion to be drawn as to the meaning of the expression "detention in legal "custody" from these statutory provisions, taken by themselves, is that, in the absence of any contrary indication in the context, the expression means detention in custody which is authorized by the law, for the object and effect of the provisions is that in the specified circumstances the detention shall be regarded as lawful.

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[3] (1841) Car. & M. 295.

I have found no indication in any other statute, judicial decision or treatise to invalidate this conclusion. It does not follow from it that all persons who are "in legal custody" are "undergoing detention in legal custody," for detention implies being compelled to remain at a particular place: for example, children would, I think, be in the legal custody of their parents or guardians, but would not be undergoing detention in legal custody.

It does however follow that, in the absence of a contrary indication in the context, the expression "detention in legal "custody" should be taken to include detention in an institution by virtue of summary reception orders made under section 16 of the Lunacy Act, 1890, in respect of persons against whom no criminal charge has been made, for such detention is ordered by a judicial authority and is compulsory. Further, a person so detained may be recaptured within 14 days without warrant or fresh order or certificate if he escapes, and it is a criminal offence for those entrusted with his custody to connive at or assist in his escape: see sections 85 and 323 of the Lunacy Act, 1890.

However, the context in which the expression "detention in "legal custody" is used in section 29 (1) (*b*) of the Act of 1946 does indicate that it is not to bear its full meaning since this would have included the preceding terms "penal servitude" and "imprisonment," which would thus have been superfluous. It therefore follows (as was held in Decision C.S.16/48 (reported)) that the expression must be taken to refer only to detention which has some connexion with criminal proceedings. Detention under section 24 (1) of the Criminal Justice Act, 1948, satisfies this condition, for it is ordered in criminal proceedings after proof that the person concerned has done the criminal act or made the criminal omission charged. It is true that the subsection provides that the provisions of the Lunacy and Mental Treatment Acts, 1890 to 1930, shall have effect as if the order were a summary reception order made under section 16 of the Lunacy Act, 1890, so that the person concerned is detained under the same conditions as persons against whom no criminal charge has been made. But on the view taken above such persons would be detained in legal custody according to the ordinary meaning of that expression. The question, therefore, is whether the context in which the expression is used in section 29 (1) (*b*) of the Act of 1946 indicates that it is not intended to apply to detention under those conditions even when the detention is ordered in criminal proceedings under section 24 (1) of the Act of 1948. It is true that the persons detained under section 24 (1), being of unsound mind, will not be fully responsible for their actions and in that sense will be innocent persons at the time the order is made, though not necessarily at the time they did the act or made the omission charged. But, as pointed out in a previous decision, persons remanded in custody or committed to prison while awaiting trial are presumed to be innocent until found guilty, and their innocence may ultimately be established by acquittal, but it was not and could not reasonably have been suggested in the argument for the Official Solicitor that the expression was not intended to apply to persons so detained. It is true, also, that the Act of 1948 had not been passed when the National Insurance Act, 1946, received the Royal Assent, but section 8 (1) (*b*) of the Mental Deficiency Act, 1913, which contains similar provisions to those of section 24 (1) of the Act of 1948, was in force when the National Insurance Act, 1946, was passed and must be taken to have been in the mind of the legislature. If, therefore, it had been intended that persons detained in mental institutions as the result of orders made under section 8 (1) (*b*) of the Mental Deficiency Act, 1913, which are of the same type as those made under section 24 (1) of the Act of 1948, should be excepted from the operation of section 29 (1) (*b*), but that persons detained as what were then called "criminal lunatics" should not be so excepted, it can hardly be doubted that express provision to this effect would have been made in section 29 (1) (*b*).

On the whole, therefore, I adhere to the view taken in a previous decision, C.S.16/48 (reported) that a person of unsound mind detained in an institution by virtue of orders made in criminal proceedings incurs disqualification under section 29 (1) (*b*) of the Act of 1946. I dismiss the appeal.

J. P. Widgery for the applicants. The question for decision is, how far are persons of unsound mind or mental defectives detained in institutions by an order of the court detained "in "legal custody" within the meaning of section 29 (1) (*b*) of the Act of 1946? Section 29 (1) (*b*) applies only to detention which is punitive or corrective in character. Once a person is detained under an order made by a court under section 24 of the Criminal Justice Act, 1948, as in the case of Timmis, that person is in the same position as a person found to be incapable of looking after himself.

The commissioner has taken the view that detention in legal custody does not go so far as including every custody which is lawful. He suggests that the proper test is whether the detention has some connexion with criminal proceedings. It is submitted that there are two alternatives which are preferable. First, detention in legal custody means detention which is punitive or corrective, or secondly, detention of a character appropriate to a person suspected or convicted of an offence, that is to say, one must look to the character of the detention rather than the order which started it. Detention in legal custody in its natural significance refers to detention by an officer of the law such as a constable or gaoler. There is a difference between detention in legal custody and detention in lawful custody. There are occasions where they have a different significance. The meaning which is sought to be attributed to legal custody here is that not only must the person so detained have fallen foul of the law, but he must be kept in the arms of the law. The latter could not be said with regard to the three applicants.

Section 29 (1) (*b*) of the Act of 1946 is essentially a penal provision, and therefore it must be the intention to apply it to persons who have forfeited their natural rights as citizens. The probable reason for that provision is to prevent a prisoner who falls ill in prison obtaining sickness benefit, and to extend it to cases such as the present, where a person has not actually been convicted, is not contemplated by section 29 (1).

[Lord Goddard C.J. A test is whether habeas corpus is available.]

It is submitted that that is not a test because the foundation of the argument is that the words "detained in legal custody" do not cover all lawful detention. Accordingly, if the meaning of the words is to be restricted, one must look at the quality of the detention. One must see whether the detention which the applicants are undergoing is to be compared with "penal servitude" or "imprisonment."

It is true that the detention in question here is a substitute for imprisonment, but once a person is taken to an institution under a court order, as in the present cases, he is in the same position as other persons in the institution. One should not look to the type of court which imposed the detention but to the circumstances under which the person is detained.

[Lord Goddard C.J. Why should persons committed to Broadmoor be in a different position from the present applicants?]

Because Broadmoor is reserved for the detention of persons accused of crime only; in other institutions a person who has committed a crime is not distinguishable from other persons whose detention is unconnected with criminal proceedings. The commissioner was right in saying that a restricted meaning must be given to the expression "detention in legal custody" in the Act of 1946, because otherwise the words "penal servitude" and "imprisonment" would have been unnecessary, for any form of detention authorized by law would have included them. The draftsmen must have wished to indicate punitive detention, and therefore "detention in legal custody" must be governed by the preceding words which indicate detention of a punitive character.

In the case of Cox, his detention order was made in 1923 and continued annually by the Board of Control. If "detention in "legal custody" is to be given any restricted meaning it must be restricted at the least to a case where the detention has some connexion with the crime. Cox's detention now cannot possibly relate to the commission of a crime in 1923. In the case of James, his original detention order, made in 1953, had not expired when his case came up for consideration.

[Ormerod J. Supposing that James were held to be detained in legal custody and Cox was not, when would the time arrive when James ceased to be so detained?]

At the end of the first year. If the words in section 29 (1) bear an extended meaning then there is no point in making any distinction, but if the meaning is to be limited then they might include Timmis and James though not Cox.

J. P. Ashworth for the Minister of Pensions and National Insurance. It is submitted, first, that the commissioner was right on the main issue, and secondly, that in any event certiorari would not lie. The three applicants, all of whom were charged with criminal offences, are detained in legal custody. It is not conceded that persons who are not detained as a result of criminal proceedings are not also within the provisions of section 29 (1) of the Act of 1946. With regard to habeas corpus, in *In re Maltby*,[4] where an order of habeas corpus was applied for in respect of an Englishman who, having been charged with committing a crime in India, was there found to be insane and was removed to England where he was detained in a lunatic asylum, the order was refused on the ground that the applicant was in lawful custody. The commissioner was over-cautious in failing to apply the provisions of section 66 of the Act of 1948 to the case of Timmis; apart from that point, nothing more can be added to the reasons of the commissioner.

J. P. Widgery in reply. The question in *In re Maltby*[4] was whether the applicant there was in lawful custody. It has never been disputed that the present applicants are in lawful custody.

LORD GODDARD C.J. Mr. Widgery moves in three cases, first on behalf of Joseph Timmis, secondly on behalf of Henry John Cox and thirdly on behalf of Aneurin James, for orders of certiorari to bring up and quash decisions given by the commissioner appointed under the National Insurance Act, 1946, whereby he decided that the three applicants were not entitled to sickness benefit under the Act. Mr. Ashworth has taken the point, which he desires to be kept open, that certiorari does not lie on the ground that the statute says that the decision of the commissioner shall be final, but it is unnecessary for us to decide that point and Mr. Ashworth has not argued it fully; he has merely reserved his rights because in the opinion of the court it is quite clear that these orders must be refused.

[His Lordship considered first the case of Timmis. He referred to the facts and to section 24 (1) of the Criminal Justice Act, 1948, and continued:] The point that arises is whether or not Timmis, who is an insured person under the National Insurance Act, 1946, and who is now in a mental hospital, is entitled to receive sickness benefit under the provisions of that Act as a person who is sick and in a hospital. For the present purposes I think that it is only necessary to consider section 29 of the Act of 1946, by reason of the provisions of which the commissioner has decided that Timmis is not entitled to receive benefit. [His Lordship read section 29 (1) and continued:] The question is whether Timmis, being a person committed to an institution under section 24 of the Criminal Justice Act, 1948, is a person undergoing detention in legal custody. It is to be observed that section 66 of the Act of 1948 provides: "Any person required or authorized by or under "this Act to be taken to any place or to be kept in custody shall, "while being so taken or kept, be deemed to be in legal custody; "and a constable, while taking or keeping any such person as "aforesaid, shall have all the powers, authorities, protection and "privileges of a constable as well beyond his constablewick as "within it." The only point on which I feel inclined to differ from the decision of the commissioner is that he seemed to think that section 66 was not conclusive of this matter. With all respect to the commissioner, I should have thought that it was clear, without any particularly subtle reasoning, that section 66 means that, if a person is committed to a hospital by virtue of the provisions of section 24, which enables him to be taken by a constable or other person and there kept and detained, he is to be taken to be in legal custody.

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[4] (1881) 7 Q.B.D. 18.

Mr. Widgery submitted, with regard to the construction of section 29, that, as the words "penal servitude" and "imprisonment" precede the words "detention in legal custody," the legal custody that is referred to there must be punitive or corrective. It seems to me that the section means that a person is to be disqualified from receiving benefit while he is detained by reason of a legal proceeding or as the result of a court proceeding. He is in custody by virtue of the decision and order of a competent court, and one might read this section as saying that he is deprived of benefit during the time he is detained in legal custody, whether it is penal servitude, imprisonment or any other form of detention. To my mind, however, the matter is put beyond doubt by section 66 of the Act of 1948, which indicates that a person detained under section 24 of the Act is detained in legal custody. Here is a man brought before a court; the court finds that he committed the offence but that he was insane at the time. The offence was one which was punishable on summary conviction because it was a form of aggravated assault and, therefore, the court had power to deal with him without sending him to trial. It would be impossible to say that a person who is brought before a court of assize charged with murder or doing grievous bodily harm, and is found insane and ordered to be detained during Her Majesty's pleasure, is not in legal custody during the time that he is in Broadmoor. I see no difference between a person sent to Broadmoor by the order of assizes and a person sent to a mental institution for persons of unsound mind by order of the magistrates. The two things seem to me to be exactly the same.

I suggested during the course of the argument that one way of testing whether a person was in legal custody or not would be to see whether habeas corpus would lie. If habeas corpus were applied for on behalf of Joseph Timmis, the answer would be: here is the order of the magistrates under which he was committed to the custody of the keeper of the mental institution and, therefore, he is being kept in the mental institution in consequence of a lawful order. He is in legal custody and the court would be bound to refuse the order for habeas corpus. For these reasons I think it is clear that Timmis is in legal custody.

In the other two cases the court proceeded under the Mental Deficiency Act, 1913, the two persons being mental defectives. The only difference between the two cases is that Cox has been detained as a mental defective for some 30 years, and James has only recently been so detained. With all respect to Mr. Widgery's argument, I do not think that that makes any difference. The scheme of the Mental Deficiency Acts is that the court makes an order, if it sees fit, instead of sending a man who has committed an offence—and a mental defective is a person who in law is responsible for his acts and not in the same position as a person of unsound mind—to prison, sending him to a place where he will receive treatment. The order in the first instance will last only for a year, but provision is made by which the Board of Control can continue the order, and it is a continuance of the order under which he is sent which remains in force so long as the Board of Control keep it in force. I think, therefore, that it is in exactly the same position as any other order. It has not expired; it remains in force because it has been continued by lawful and statutory authority by the Board of Control. I can see no difference between persons who are detained under the Mental Deficiency Act and persons who are detained under section 24 of the Criminal Justice Act, 1948. In either case it seems to me that they are in legal custody, that is to say, they are detained under and by virtue of a legal proceeding. It is not necessary to consider, and I desire to say at once that this court is not deciding, a case where a summary reception order is made, which has nothing to do with a criminal offence. Whether there is any difference, I do not know. It is not for this court to give a decision in any case except the cases before them. These particular cases are cases where an order has been made by a court exercising criminal jurisdiction in accordance with criminal law, and for these reasons I think that the orders must be refused.

LYNSKEY J. I agree.

ORMEROD J. I agree.

Applications refused.

Solicitors: *Official Solicitor; Solicitor, Ministry of Pensions and National Insurance.*

C. J. E.

C. A.
1954
Oct. 14, 15.

Evershed M.R., Hodson and Romer L.JJ.

KING *v.* TAYLOR.

[Plaint No. K.P. 189.]

Landlord and Tenant — Rent restriction — Possession application — Appeal to Court of Appeal—Change of circumstances—Dwelling-house required by landlord for personal occupation — Landlord's application for possession dismissed—Greater hardship—Question of fact—Landlord's appeal—Death of his wife—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3 (1), *Sched. I, para.* (*h*).

A landlord of premises at Mitcham, within the protection of the Rent Acts, sought an order for possession on the ground that the premises were required for occupation as a residence for himself and his wife. He and his wife were old and in poor health and they desired to return to Mitcham from Shrewsbury, where they were living, in order that they might be near to a daughter who would be able to visit them frequently and to assist them in case of illness. The county court judge dismissed the application, holding that greater hardship would be caused to the tenant by granting the application than by refusing it, because the tenant had not found other accommodation. According to the evidence, the tenant had made only very slight efforts to find other accommodation. The landlord appealed. Between the hearing in the county court and the hearing in the Court of Appeal the landlord's wife had died:—

Held, that, save in most exceptional circumstances, the question of comparative hardship was one for the county court judge. Having regard to the proviso to paragraph (*h*) of Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the question whether other accommodation was available was a relevant circumstance in considering the balance of hardship. There being some evidence of hardship, the decision of the county court judge could not be the subject of appeal.

Coplans v. *King* [1947] 2 All E.R. 393 applied.

Per curiam. Having regard to the imperative language of section 3 and the proviso to paragraph (*h*) of Schedule I to the Act of 1933, if, where an order for possession has been refused, it is shown to the Court of Appeal that the circumstances of the parties have changed in a way which is material in the consideration and enforcement of the provisions of the Act since the date of the hearing in the county court, the Court of Appeal is not entitled to ignore that change of circumstance. The proper course is for that court, being asked to make an order for possession, to take into consideration all the circumstances before it. In the converse case, where the county court has made an order for possession, the function of the Court of Appeal is, prima facie, to consider whether the order was rightly made, having regard to the facts and circumstances which were before the county court.

Goldthorpe v. *Bain* [1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23 explained.

APPEAL from Judge Rice-Jones sitting at Croydon County Court.

The plaintiff, Charles Arthur King, the landlord of 286, Grove Road, Mitcham, sought an order for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) and Sch. I (*h*),[1] against the defendant, R. M. Taylor, the tenant, on the ground that the landlord required the premises for occupation as a residence for himself and his wife. The county court judge determined the application in favour of the tenant, on the ground that greater hardship would be caused by granting the application than by refusing it.

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[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1): "No order or judgment for "the recovery of possession of any "dwelling-house to which the principal Acts apply . . . shall be made "or given unless the court considers "it reasonable to make such an order "or give such a judgment, and either "—(*a*) the court has power so to do "under the provisions set out in the "First Schedule to this Act; or (*b*) the "court is satisfied that suitable alternative accommodation is available "for the tenant . . ."

Sch. I: "A court shall, for the "purposes of section 3 of this Act, "have power to make or give an "order or judgment for the recovery "of possession of any dwelling-house "to which the principal Acts apply "or for the ejectment of a tenant "therefrom without proof of suitable "alternative accommodation (where "the court considers it reasonable so "to do) if—. . . (*h*) the dwelling "house is reasonably required by the "landlord . . . for occupation as a "residence for—(i) himself . . . Provided that an order or judgment "shall not be made or given on any "ground specified in paragraph (*h*) ". . . if the court is satisfied that "having regard to all the circumstances of the case, including the "question whether other accommodation is available for the landlord or "the tenant, greater hardship would "be caused by granting the order or "judgment than by refusing to grant "it."

The landlord appealed. Between the date of the hearing in the county court and the hearing in the Court of Appeal the landlord's wife died.

A. M. Hughes-Chamberlain for the landlord. The landlord claims possession under paragraph (*h*) of the First Schedule to the Act of 1933 on the ground that greater hardship would be caused to him by refusing possession than to the tenant by granting it. In this case the evidence on behalf of the tenant does not show any hardship to him at all. He has not, in fact, made any serious attempt to find alternative accommodation. The position of the landlord has changed since the hearing in the county court because his wife has died. That, however, is not a factor to be taken into account. It is stated in Megarry's Rent Acts, 7th ed., p. 270, that the facts at the date of hearing crystallize the situation. Evidence of facts occurring after the hearing in the county court are inadmissible: *Goldthorpe* v. *Bain.*[2]

W. D. M. Sumner for the tenant. The question whether greater hardship will be caused by granting an order for possession than by refusing it is one for the county court judge: *Coplans* v. *King.*[3] The county court judge has found that there was no prospect of the tenant finding another house. It is impossible to say that there was no evidence on which he could have reached his conclusion. His finding is conclusive.

EVERSHED M.R. In my opinion, it is not possible for this court to interfere with the judgment given in this case. It is a case which falls within the scope of paragraph (*h*) of the First Schedule of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, such cases being sometimes compendiously referred to as cases of comparative hardship.

[His Lordship read section 3 (1) and the proviso to paragraph (*h*) of Schedule I to the Act of 1933, and continued:] It is not in doubt that where the other conditions have been satisfied, as they were in this case, so that the only matter remaining is for the court to form a view under the proviso as to the comparative hardship, then the onus is shifted to the tenant, and it is for the tenant to show that greater hardship would be caused by making the order than by declining to make it.

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[2] [1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23.

[3] [1947] 2 All E.R. 393.

In *Coplans* v. *King* [1] this court laid it down that, save in most exceptional circumstances, the question of comparative hardship is essentially one for the county court judge. I think the headnote of the case accurately states the conclusion: "The decision "of the county court judge, when considering whether or not to "make an order for the possession of a house within the Rent "Restrictions Acts, with regard to the balance of hardship under "the proviso to the First Schedule to the Rent and Mortgage "Interest Restrictions (Amendment) Act, 1933, is final and can"not be made the subject of appeal to the Court of Appeal." At the end of his judgment Lord Greene M.R. said [2]: "Of course, "if in a case there is evidence of hardship on one side and none "on the other, the county court judge can come to only one "conclusion, and if he finds hardship where the facts are not "sufficient to constitute hardship in law—for example, something "trivial, like the absence of a view of a neighbouring hill, river, "tree, or something pleasant of that kind—he makes an error in "law, but, once there is evidence which in law can amount to "hardship on two sides, Parliament has deliberately made the "county court judge the conclusive judge of the fact which is the "greater hardship."

In the present case Mr. Hughes-Chamberlain has quite properly, but also necessarily, contended that there was here no evidence whatever of any hardship on the side of the tenant. I do not propose to take up time by a full recital of the facts. The landlord is undoubtedly a man who deserves a good deal of sympathy, and indeed a good deal more sympathy now than he did when the case was before the county court judge. He is a man approaching 70 and, at the time the matter was heard, his wife was over 70. They were both, as shown by doctor's evidence, in a relatively fragile state of health. The landlord lived and lives in Shrewsbury. The house where he seeks to make his home, his other house, now occupied by the tenant, is at Mitcham. One of the great advantages which was pointed out on his behalf in making that change was that the landlord has two daughters, one, a Mrs. Vogle, living in London. Mrs. Vogle in her evidence said that she went once a month or so to see her father at Shrewsbury, a long journey; if her father came to live at Mitcham, it would be a journey of one and a half hours from her home to his and she would be able to go and visit him and her mother, who was then alive, much more often. That was obviously a point of force and substance.

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[1] [1947] 2 All E.R. 393.

[2] Ibid. 394.

On the other side, the tenant is a man much younger and, as far as I can tell, relatively robust, with a wife and two grown-up sons (that is, a family of four) who has work to do in or near Mitcham. The evidence on his side was that he had not been able to find alternative accommodation. Mr. Hughes-Chamberlain, again if I may say so, very naturally and properly, challenged that evidence and said that, on any kind of analysis, it was shown really to amount to nothing at all, at least nothing more than that the most casual inquiries had been made, and, as to those, the substance of them seemed to have been directed to furnished lodgings.

It is plain from the proviso to paragraph (*h*) that the question whether other accommodation is available is a relevant circumstance in considering the balance of hardship. Notwithstanding the challenge of Mr. Hughes-Chamberlain and notwithstanding that I confess that I am disposed with him to think that the evidence of attempts to find fresh accommodation is of a slight character, nevertheless there was some such evidence; and this judge would be entitled, in my view, to make use of his experience as a judge sitting in that part of London in coming to a conclusion whether the evidence given on the tenant's side of the difficulty in getting other accommodation was likely to be correct. The judge concluded his judgment by the observation, "Great moral "obligation on defendant to find another house." Mr. Hughes-Chamberlain said that, unless there really was a chance of finding one, there could be no such moral obligation; but, as I have said, I think it impossible to deny that there was evidence of a material circumstance of hardship of some sort on the tenant's side; and, that being so, the language of Lord Greene M.R.'s judgment in *Coplans* v. *King* [3] seems to me to conclude the matter.

But there is another consideration, no less significant, which in my judgment emphasizes that this court must make now no order on the appeal, except to dismiss it. At the time when the matter was before the county court, as I have said, the landlord had a wife, slightly older than himself and suffering from frailty in health. Unhappily, between the hearing in the county court and the hearing in this court the wife has died and the landlord is therefore left alone. It is plain that that circumstance must vitally affect any consideration of what his future should be, where he should live, and so forth. It must be a matter to which Mrs. Vogle, his daughter, will have given or will give most careful consideration.

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[3] [1947] 2 All E.R. 393.

Mr. Hughes-Chamberlain said that, in the Rent Acts by R. E. Megarry, 7th ed., p. 270, it is stated that this court must consider the question in a case of this kind upon the facts as they were in the county court. The passage he relied upon is: "The circumstances to be considered are those existing at the "time of the hearing, and the subsequent disappearance of "the predominant hardship (*e.g.*, between the hearing and "an appeal) does not affect the position." The case cited in support of that proposition is that of *Goldthorpe* v. *Bain* [4] in this court. That was a case in which an order for possession had been made in favour of a landlord, who had later died. There was no appeal, as I follow the case, from the order giving possession, but after the death of the successful landlord, the tenant having remained in possession, the former landlord's daughter, who succeeded to the property, proceeded to apply to enforce the judgment. The county court dismissed her application, holding that the order for possession was merely personal to the particular landlord in whose favour it had been given. From that decision of the county court there was an appeal to this court, and this court held that an order for possession of that kind was not merely personal, but enured for the benefit of the person entitled, as personal representative and beneficially, to the estate of the former landlord. It was, however, pointed out by Somervell L.J. that, although the landlord's daughter in those proceedings was entitled to enforce the order, that right would be subject to the corresponding right of the tenant to apply to the judge under section 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to extend the time for giving up possession. In so far, therefore, as it was sought to say that Mr. Megarry's sentence meant that, when the county court judge had dismissed a landlord's claim for possession and the landlord appealed, events which had occurred after the hearing in the county court were irrelevant in the Court of Appeal, the case of *Goldthorpe* v. *Bain* [4] does not plainly support any such proposition.

It is strictly unnecessary for me in the present case to express a final opinion, but, as at present advised, and having regard to the imperative language of section 3 of the Act of 1933, and the proviso to paragraph (*h*), it seems to me that, if in such a case as this it is shown to the court that the circumstances have changed materially (and I mean by "materially" in a way which is material in the consideration and enforcement of the provisions of the Act) since the date of the hearing before the county court, it does not by any means follow that this court is entitled to ignore that change of circumstances. In my judgment, the proper course is for the court, which is asked to make an order for possession, to take into consideration all the circumstances which are then before it. In the converse case, where the county court has made an order for possession, then no doubt the function of this court on an appeal is, prima facie at any rate, to consider whether the order was rightly made having regard to the facts and circumstances which were before the county court. But, as it seems to me, the situation is not the same when this court is asked to make the order for possession on the landlord's appeal; for I take the words "the court" in section 3 (1) of the Act of 1933, and the proviso to paragraph (*h*), to mean "the court which "is being asked to make the order."

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[4] [1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23.

I have said that, since the hearing in the county court, the landlord has unhappily become a widower, and that he will no doubt have considered with his daughter what in his and her interests it will be best for them both to do. I think, when they have considered it, there may well be a case for another application to the court, particularly if their view is that the landlord should come to live nearer to his own children. If the landlord does make further application and it then transpires that the tenant, in spite of the "great moral obligation" which the county court judge thought lay upon him, has, in effect, done nothing or nothing very much, it may be—though I will say no more—that the tenant will not be so favourably received on the future occasion as he was on the past. Subject to those more general observations, I think that we cannot here interfere and that the appeal must fail.

HODSON L.J. I agree. The question for consideration by the county court judge was what is called the balance of hardship; and, there being evidence of hardship on the tenant, this appeal must necessarily fail. This court has considered that situation and made the position very clear by the judgment of Lord Greene M.R. in *Coplans* v. *King*,[5] to which reference has already been made by my Lord. I share my Lord's view as to the position of this court where a change of circumstances has to be considered. It is, of course, true that, where an order has been made for possession, the circumstances to be considered are those existing at the time of the hearing and the subsequent disappearance of the predominant hardship does not affect the position. The authority for that, if authority were necessary, is the case of *Goldthorpe* v. *Bain* [6]; but it does not follow from that, as Mr. Hughes-Chamberlain sought to argue, that the converse is true, for in my view no court could consider the making of an order to operate in futuro without considering the changed circumstances after an application had been made before the county court judge and had failed. I agree that this appeal must be dismissed.

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[5] [1947] 2 All E.R. 393.

ROMER L.J. I also agree and have nothing to add on the question of the conclusive character of the decision of the county court judge on issues of comparative hardship, having regard to the decision of this court in *Coplans* v. *King*.[7]

I only desire to express my concurrence with what the Master of the Rolls and Hodson L.J. have said on the second point. It is true that, if the predominant hardship lies with the landlord at the hearing before the county court judge, and he obtains an order for possession, he would not lose his order merely because the predominance had shifted to the tenant before the case was heard by the Court of Appeal; but where at the original hearing the county court judge has refused an order on the ground that the predominant hardship would lie with the tenant, then, even if the Court of Appeal thought that the judge was wrong, it would not, I think, make an order for possession, if it appeared that the grounds of hardship on which the lessor had originally relied had disappeared or substantially changed since the hearing; because no court, whether the county court or this court, can make an order for possession under paragraph (*h*) of the First Schedule to the Act of 1933, unless the conditions of that provision with regard to hardship are satisfied at the date when the order is made. I agree that this appeal fails.

Appeal dismissed.

Solicitors: *H. W. Perkins & Co.; W. Timothy Donovan.*

B. A. B.

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[6] [1952] 2 Q.B. 455.

[7] [1947] 2 All E.R. 393.

1954
July 19,
20, 30.

Pilcher J.

C. A.

1954
Oct. 11, 12,
13, 29.

Denning,
Jenkins and
Morris L.JJ.

ADLER *v.* DICKSON AND ANOTHER.

[1953 A. No. 579.]

Contract—Exceptions clause—Negligence—Tort—Action against servant —Conditions exempting shipping company from liability for injury to passenger — Injury to passenger due to alleged negligence of servants of company—Action against servants—Whether entitled to protection of conditions.

Contract—Jus tertii. Shipping—Passenger.

A sailing ticket issued to the plaintiff by a shipping company for a Mediterranean cruise contained, inter alia, the following conditions: "Passengers . . . are carried at passengers' entire "risk" and "The company will not be responsible for and shall "be exempt from all liability in respect of any . . . injury "whatsoever of or to the person of any passenger . . . whether "the same shall arise from or be occasioned by the negligence of "the company's servants . . . in the discharge of their duties, or "whether by the negligence of other persons directly or indirectly "in the employment or service of the company . . . under any "circumstances whatsoever . . ."

The plaintiff, who was injured when mounting the gangway of the ship at a port of call, brought an action in negligence against the master and boatswain of the ship.

On a preliminary question whether the defendants were entitled to the protection admittedly afforded to the company by the conditions of the ticket:—

Held, by the Court of Appeal, that since the contract neither expressly nor by necessary implication deprived the plaintiff of her right to sue the defendants in tort, she was entitled to pursue her claim against them.

Per Denning L.J. The law permits a carrier to stipulate for exemption from liability of those whom he engages to carry out the contract, even though they are not parties to it, provided the injured party assents expressly or by necessary implication to the exemption.

Per Jenkins L.J. Even if these provisions had contained words purporting to exclude the liability of the company's servants, non constat that they could rely on them, for they were not parties to the contract.

Per Morris L.J. Unless a company contracts as agents for its servants, they cannot claim immunity under the contract for their personal torts.

Cosgrove v. *Horsfall* (1945) 62 T.L.R. 140 applied.

Elder, Dempster & Co. v. *Paterson Zochonis & Co. Ld.* [1924] A.C. 522; 40 T.L.R. 464 distinguished.

Decision of Pilcher J. affirmed.

PRELIMINARY point of law.

This point of law arose in an action brought by the plaintiff, Mrs. Rose Marks Adler, against the defendants, Dickson and Wallis, respectively master and boatswain of the P. & O. Steam Navigation Co.'s steamship *Himalaya*, in the following circumstances.

On July 15 or 16, 1952, the *Himalaya*, in which the plaintiff was travelling as a first-class passenger, was lying berthed at Trieste in the course of a Mediterranean cruise, and gangways had been placed between the ship and the shore to enable passengers to go ashore and return on board. The plaintiff had been on shore and was walking along one of these gangways on her way back to the ship when it suddenly moved and fell to the side of the ship, with the result that the plaintiff was thrown from the gangway on to the wharf, some 16 feet below, and sustained serious injuries.

The contract between the company and the plaintiff, as evidenced by the ticket issued to her by the company, included the following provisions. Printed on the ticket itself, were the words: "Your attention is specially directed to the conditions "of transportation on the covers containing this ticket. "Passengers and their baggage are carried at passengers' entire "risk." Printed on the inside front cover were certain conditions which (so far as material for the present purpose) ran thus: "Conditions and Regulations. This ticket is issued by "the company and accepted by the passenger subject to the "following conditions and regulations. The company will not be "responsible for and shall be exempt from all liability in respect "of any . . . injury whatsoever of or to the person of any "passenger . . . whether such injury of or to the person of "any passenger . . . shall occur on land, on shipboard or else-"where . . . and whether the same shall arise from or be "occasioned by the negligence of the company's servants on "board the ship or on land in the discharge of their duties, or "while the passenger is embarking or disembarking, or whether "by the negligence of other persons directly or indirectly in the "employment or service of the company, or otherwise, or by "the act of God . . . dangers of the seas . . . or by accidents . . . "or any acts, defaults or negligence of the . . . master, mariners ". . . company's agents or servants of any kind under any "circumstances whatsoever. . . ."

Those provisions of the contract admittedly precluded the plaintiff from suing the company for damages in respect of the injuries she had sustained, even if the accident could be shown to have been due to the negligence of the company's servants. She therefore brought the present action against the defendants, Dickson and Wallis, claiming damages from them on the ground that the injuries she had sustained through the fall of the gangway were caused by their negligence. This claim was formulated in the statement of claim thus: "4. The defendants "in the course of their respective duties as master and boat-"swain of the ship were, and each of them was, responsible for "berthing the said ship at Trieste and for placing and main-"taining gangways leading from the said ship to the shore, so "as to enable the passengers of the said ship to go ashore and "to return to the said ship, and such berthing and the placing "and maintaining of such gangways were carried out under the "supervision, control, management and direction of the defen-"dants and each of them, who at all material times well knew "and intended that the plaintiff should use the gangway. . . . "6. The said injuries and loss and damage" (i.e., those resulting from the accident as described and particularized in paragraph 5) "were occasioned to the plaintiff by reason of the negligence "and/or breach of duty on the part of the defendants and each "of them."

Then followed a number of sub-paragraphs of particulars of the alleged negligence and/or breach of duty, for example: "(*a*) Fail-"ing to take any or adequate precautions for the safety of the "plaintiff in the use which they knew or ought to have known "she would be making of the said gangway. (*b*) Causing or "permitting the said gangway to be placed from the ship to the "shore without taking any or any adequate or effective measures "to ensure that it was and would remain safe and secure for the "plaintiff to use. (*c*) Causing or permitting the said gangway "to be used by the passengers of the said ship, including the "plaintiff, without taking any or any adequate measures to "ensure that the same was properly and effectively secured and "made fast and would not and could not move suddenly while "the plaintiff was lawfully using the same. . . . (*e*) Causing "or permitting the plaintiff to use the said gangway without first "ascertaining or ensuring that it was safe for her to do so, and "when they knew or ought to have known it was in an unsafe, "unstable and insecure state and condition, and was a danger "and trap for the plaintiff to use. . . . (*g*) Failing to take any "or any adequate measures or to provide any or any proper "system to maintain the said gangway in a safe and secure state "and condition."

The defendants by their defence pleaded, inter alia, the material provisions of the ticket issued to the plaintiff, and by paragraph 3: "The accident to the plaintiff referred to in the "statement of claim . . . occurred while the plaintiff was a "passenger on the *Himalaya* upon the terms of the said ticket. "If (which is denied) either of the defendants was personally "responsible for the safety of the gangway . . . then the defendants' acts or omissions (if any) in relation to the said gangway "and any other material acts or omissions on the part of either "of the defendants took place in pursuance or performance of the "contract between the plaintiff and the Peninsular and Oriental "Steam Navigation Company (herein referred to as 'the Company') as contained in or evidenced by the plaintiff's said "ticket and/or subject to the terms of the said ticket and the "defendants are in the premises entitled to rely upon the terms "of the said ticket. Further or alternatively any such acts or "omissions on the part of either of the defendants occurred while "the defendants were acting as the servants or agents of the company and the defendants are accordingly entitled to the same "protection as that afforded to the company by the terms of the "said ticket. Further, or alternatively, in contracting with the "plaintiff upon the terms of the said ticket the company acted "in all material respects as the agent of its servants and agents "(including the defendants) and thereby exempted the defendants "from any liability such as is referred to in the statement of "claim. The said agency arises by implication of law. Further "or alternatively by reason of her acceptance of the ticket and "of the terms thereof the plaintiff expressly or impliedly agreed "to travel in all respects at her own risk and/or impliedly agreed "with the company's servants and agents (including the "defendants) that they should be under no liability to the "plaintiff in connexion with any injury sustained by her as a "passenger on the *Himalaya*."

On June 14, 1954, an order was made under R.S.C., Ord. 25, r. 2, for the trial as a preliminary issue of the point of law raised by paragraph 3 of the defence, namely, whether the terms of the ticket, held by the plaintiff as a passenger on the ship at the time of the accident, afforded a defence to the defendants against the plaintiff's claim, upon the assumption that the plaintiff could establish the matters referred to in her statement of claim. This issue was argued before Pilcher J. on July 19 and 20, 1954.

J. G. Le Quesne for the plaintiff.
Michael Kerr for the defendants.

Cur. adv. vult.

July 30. PILCHER J. read the following judgment, in which he stated the facts, and continued: The issue which I am asked to determine is whether the points of law raised by paragraph 3 of the defence, namely, whether the terms of the ticket held by the plaintiff as a passenger on the *Himalaya* at the time of the accident afford a defence to the defendants against the plaintiff's claim (upon the assumption that the plaintiff could establish the matters referred to in her statement of claim). The first page of the ticket under which the plaintiff was travelling contained the following provision: "Passengers . . . are carried at passengers' "entire risk." On the inside of the front cover of the ticket appear certain conditions and regulations. Under this heading the following words appear: "This ticket is issued by the company and accepted by the passenger subject to the following "conditions and regulations." The conditions and regulations which are material for my purpose are as follows: "The company "will not be responsible for and shall be exempt from all liability "in respect of any . . . injury whatsoever of or to the person of "any passenger whether such injury of or to the person of any "passenger . . . shall occur on land, on shipboard or elsewhere . . . "and whether the same shall arise from or be occasioned by the "negligence of the company's servants on board the ship or on "land in the discharge of their duties, or while the passenger is "embarking or disembarking, or whether by the negligence of "other persons directly or indirectly in the employment or service "of the company, or otherwise, or by the act of God . . . dangers "of the seas . . . or by accidents . . . or any acts, defaults or "negligence of the . . . master, mariners . . . company's agents or "servants of any kind under any circumstances whatsoever . . ."

I approach the point which I have to consider on the assumption that it is established that the plaintiff's accident and injuries were caused by the negligence of one or other or both of the defendants, neither of whom was, on the face of any document, in direct contractual relationship with the plaintiff. I assume also that the acts of negligence of which the defendants or either of them were guilty were acts performed by them in the course of the ordinary duties of their respective offices on board the *Himalaya*. It is perhaps remarkable that the particular point which I am asked to decide never appears to have engaged the attention of the court in a claim for personal injuries, although the proposition that agents concerned in the carriage of goods on behalf of a principal are, in appropriate circumstances, entitled to claim the benefit of exception clauses in the contract of carriage between their principal and the goods owner seems to be established.

I was referred by Mr. Kerr, who appeared on behalf of the defendants, to a number of authorities commencing with *Elder Dempster & Co.* v. *Paterson Zochonis & Co. Ld.*[1] Inasmuch as arguments advanced on behalf of the defendants were founded largely, if not entirely, upon the judgments in the *Elder Dempster* case,[1] it is desirable that I should go into the facts of the case in some little detail. The plaintiffs, Paterson Zochonis, were the owners of a quantity of palm oil in casks loaded on board the steamship *Grelwen*. The *Grelwen*, which belonged to Griffiths Lewis Steam Navigation Co., was at the material time under charter by Elder Dempster & Co. for the purpose of their West African trade. The bills of lading covering the palm oil were issued in the names of African Steamship Co., British and African Steam Navigation Co. Managers, and Elder Dempster & Co. These three companies, together with Griffiths Lewis Steam Navigation Co., the owners of the vessel, were made defendants in the action. A quantity of casks of palm oil were stowed in the bottom of the vessel's holds and a large number of bags of palm kernels which were stowed on the top of the casks of palm oil crushed those casks with the result that the palm oil was lost and damaged. The vessel was not fitted with "tween decks."

Rowlatt J., who tried the case at first instance, found in favour of the plaintiffs on the ground that the vessel was unseaworthy. His decision was affirmed by the Court of Appeal with Scrutton L.J. dissenting. The bills of lading issued by the charterers absolved them from responsibility for damage due to bad stowage. The owners of the *Grelwen* were not parties to the contract evidenced by the bills of lading. Scrutton L.J., in the Court of Appeal, took the view that there had been no breach by the defendants of the implied warranty of seaworthiness, and that the damage to the goods was due to bad stowage. He said[2]: "The

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[1] [1924] A.C. 522; 40 T.L.R. 464.

[2] [1923] 1 K.B. 420, 441.

"above considerations lead to the conclusion that the charterers, "with whom in my opinion the bill of lading contract was made, "and who include the first three defendants, were protected by the "exceptions in their bill of lading. But it was argued that the "fourth defendant, the owner, was liable in tort because he was "not a party to the bill of lading and therefore could not claim the "benefit of the exceptions contained in it, but was a bailee liable "for negligence—i.e., bad stowage. To this counsel for the owner "made reply that the owner in the case of a time charter like the "present one was not in possession of the goods. This in my "opinion is contrary to all the authorities . . . The real answer "to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, "with whom the owner of the goods has made a contract defining "his liability, and that the owner as servant or agent of the "charterer can claim the same protection as the charterer. Were "it otherwise there would be an easy way round the bill of lading "in the case of every chartered ship; the owner of the goods "would simply sue the owner of the ship and ignore the bill of "lading exceptions, though he had contracted with the charterer "for carriage on those terms and the owner had only received "the goods as agent for the charterer." I refer to this passage in the dissenting judgment of Scrutton L.J. because, when the matter came before the House of Lords, where it was twice argued, the charterers' and owners' appeal was allowed, the House of Lords agreeing with Scrutton L.J. that the damage was due to bad stowage and not to any breach of warranty of seaworthiness.

Dealing with the position of the shipowners, Lord Cave said [3]: "There remains a further question, which arises between the "shippers and the shipowners, the Griffiths Lewis Steam Navigation Co. It is contended on behalf of the respondents that, "assuming their loss to be due to bad stowage on the part of the "master of the ship, the owners are not protected by the con-"ditions of the bill of lading, to which they were not parties, and "are accordingly liable in tort for the master's negligence. . . . "I do not think that this argument should prevail. It was "stipulated in the bills of lading that 'the shipowners' should "not be liable for any damage arising from other goods by stow-"age or contact with the goods shipped under the bills of lading; "and it appears to me that this was intended to be a stipulation "on behalf of all the persons interested in the ship, that is to say,

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[3] [1924] A.C. 522, 533.

"charterers and owners alike. It may be that the owners were "not directly parties to the contract; but they took possession "of the goods (as Scrutton L.J. says) on behalf of and as the "agents of the charterers, and so can claim the same protection "as their principals."

Lord Finlay said[4]: "It is said that the imposition of the "weight of the kernels on the top of the palm oil barrels was a "wrongful act, resulting in the destruction of the barrels and the "loss of the oil, and that for this wrongful act, committed by "their servants, the shipowners are liable, apart from contract "altogether, so that the plaintiffs, in claiming from the ship-"owners, would not be hampered by the conditions of the bill "of lading. This contention seems to me to overlook the fact "that the act complained of was done in the course of the stowage "under the bill of lading, and that the bill of lading provided that "the owners are not to be liable for bad stowage. If the act com-"plained of had been an independent tort unconnected with the "performance of the contract evidenced by the bill of lading, the "case would have been different. But when the act is done in the "course of rendering the very services provided for in the bill of "lading, the limitation on liability therein contained must attach, "whatever the form of the action and whether owner or charterer "be sued."

Lord Sumner, dealing with the same point, said[5]: "It may "be, that in the circumstances of this case the obligations to be "inferred from the reception of the cargo for carriage to the "United Kingdom amount to a bailment upon terms, which "include the exceptions and limitations of liability stipulated in "the known and contemplated form of bill of lading. It may be, "that the vessel being placed in the Elder, Dempster & Co.'s "line, the captain signs the bills of lading and takes possession "of the cargo only as agent for the charterers, though the time "charter recognizes the ship's possessory lien for hire. The "former I regard as the preferable view, but, be this as it may, "I cannot find here any such bald bailment with unrestricted "liability, or such tortious handling entirely independent of con-"tract, as would be necessary to support the contention." Lord Dunedin agreed with the opinion of Lord Sumner.

It will be seen from the passages which I have quoted from Scrutton L.J.'s judgment in the Court of Appeal, and the speeches in the House of Lords, that the grounds upon which the shipowners were held entitled to escape liability are not all based upon the same line of reasoning. Lord Cave and Lord Finlay appear to have attached some importance to the fact that the bills of lading in terms exempted the "shipowners" from liability for bad stowage. Reference to the record of the case in the House of Lords shows that the bills of lading under which the goods were carried were on the printed form used by the first three defendants when carrying cargo in their own ships. This form of bill of lading was consequently in some respects inappropriate for use with a chartered ship. Clause 1 of the bill of lading commences with the words, "The shipowners (hereinafter called the 'the company')." Clause 2 of the bill of lading, which contains the exceptions clause with regard to bad stowage commences, "The company shall not "be liable . . ." It is clear that the contractual exemption from liability for bad stowage could only, on the face of it, be an exemption operating in favour of the first three defendants. The responsibility for storage rested, of course, solely upon the master and officers of the ship, and not upon the charterers, and it would seem that this fact should be borne in mind in reading the passages which I have quoted from the speeches of Lord Cave and Lord Finlay. It will be observed, moreover, that neither Scrutton L.J. nor Lord Sumner mention the fact that the bills of lading expressly excepted "the shipowner" or, more accurately, "the company" from the consequences of bad stowage.

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[4] [1924] A.C. 522, 547.

[5] Ibid. 564.

Scrutton L.J. bases his judgment on the fact that, in his view, the shipowner is to be regarded as being in possession of the goods as the agent of the charterer with whom the goods owner has made a contract defining his liability. Lord Cave appears to take the same view. Lord Finlay, whilst making the point that the charterer has specifically agreed that the shipowner should not be liable for bad stowage, stresses the point that the negligence of the shipowner was committed in the course of rendering the very services provided for in the contractual document, namely, the bills of lading. Lord Sumner took the view that the theory that the shipowner must be taken to be acting as agent for the charterer might be correct, but he preferred the view that the shipowner was not liable because he took the goods upon an implied bailment in the terms of the bills of lading.

I have dealt at some length with the *Elder Dempster* case [6] because the points made by the defendants in the present case, as set out in paragraph 3 of the defence, are clearly based largely upon the passages in the judgments in the *Elder Dempster* case[6] to which I have referred. It is clear that the notion of an implied bailment is inappropriate to a case where personal injuries to a passenger are in question. The defendants in the present case contend in general terms that on the admitted facts they are entitled to the protection afforded to their employers by the terms of the passenger ticket. They submit that they are entitled to such protection (1) because the acts of negligence which caused the injuries to the plaintiff occurred whilst they, the defendants, were carrying out their normal duties as the servants of their employers; (2) because in making the contract with the plaintiff evidenced by the terms of the ticket, their employers were acting as the defendants' agents and thus impliedly exempted the defendants from legal liability for their own negligence to the plaintiff; (3) because, in accepting the terms of the ticket, the plaintiff expressly or impliedly agreed to travel at her own risk and impliedly agreed that the company's servants, including the defendants, should be under no liability to her.

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[6] [1924] A.C. 522.

Having attempted to analyse the reasons given by the noble Lords in the *Elder Dempster* case[7] for excusing the shipowners from liability for bad stowage, it is interesting to observe the view which Scrutton L.J. took in the following year of the effect of the House of Lords' decision on this particular point. The passage I am about to quote is taken from *Mersey Shipping and Transport Co. Ld.* v. *Rea Ld.*[8] I would, however, add that the passage was not, strictly speaking, necessary for the decision of the case which was being considered. Scrutton L.J. said[9]: "I think that "the reasoning of the House of Lords in the *Elder Dempster* "case[10] shows that where there is a contract which contains an "exemption clause, the servants or agents who act under that "contract have the benefit of the exemption clause. They cannot "be sued in tort as independent people, but they can claim the "protection of the contract made with their employers on whose "behalf they are acting. I think that is the result of the second "point in the judgments of Lord Cave and Lord Sumner with "whom Lord Dunedin concurs, in the *Elder Dempster* case."[10] It will be observed in this passage that Scrutton L.J. states the proposition very generally and widely. It is, I think, conceded on behalf of the plaintiff in the present case, that if the proposition stated by Scrutton L.J. in the passage I have quoted is correct, the point of law which I have to determine must be answered in favour of the defendants.

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[6] [1924] A.C. 522.
[7] Ibid.
[8] (1925) 21 Ll.L.R. 375.
[9] Ibid. 378.
[10] [1924] A.C. 522.

My attention has been called to two recent Australian cases in which the facts were that cargo, whilst subject to the terms of bills of lading, was damaged during discharge by the negligence of a firm of stevedores engaged by the shipowners. In each case the goods owner sued the stevedores in tort, and in each case, although of course not parties to the contracts evidenced by the bills of lading, the stevedores were held entitled to the protection of the exception clauses in the bills of lading. The cases to which I refer are, *Gilbert Stokes and Kerr Proprietary Ld.* v. *Dalgety and Co. Ld.*,[11] and *Waters Trading Co. Ld.* v. *Dalgety and Co. Ld.*[12] In the *Gilbert Stokes* case[13] Owen J., sitting in the Supreme Court of New South Wales, after making an analysis of the judgments of the *Elder Dempster* case,[14] decided in favour of the defendant stevedores on the ground that they were in all the circumstances bailees receiving the goods on the same terms as the shipowner had received them, namely, the terms of the bills of lading. Owen J. said[15]: "*Elder Dempster's* case[16] "seems to me to be an authority directly in point for the defendant's contention that it is entitled to the benefit of the same "limitations of liability which could have been claimed by the "carrier had it been sued; but it discloses a difference of opinion "as to the reasons for the final conclusion. With all respect, "I think that the notion that the grantor of a bill of lading makes "it both as a principal and as an agent for those whom he may "employ to perform the contract, with the result that all who "take part in the performance of the contract become parties to "it, and the converse proposition that he acts as an agent for the "cargo-owners to make contracts on the latter's behalf with all "who may be employed to effect the contractual carriage, introduces an unreal and fictional element into a commercial transaction, and for that reason alone does not appeal. As to the "contention that an agent, as a matter of general principle, is "entitled to the immunities of his principal, were it not for the "fact that both Scrutton L.J. and Lord Cave appear to have "accepted the proposition without demur, I would have thought "that no such general principle was to be found in the law of "agency. . . ."

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[11] (1948) 81 Ll.L.R. 337.
[12] [1951] 2 Ll.Rep. 385.
[13] 81 Ll.L.R. 337.
[14] [1924] A.C. 522.
[15] 81 Ll.L.R. 342.
[16] [1924] A.C. 522.

In the *Waters Trading Co.* case[17] Street C.J., presiding in the Supreme Court of New South Wales, gave judgment in favour of the defendant stevedores and said: "It was obviously contemplated by the parties that the goods would have to be removed "and stored for a period before being delivered, and during that "period the contract was still on foot and bound the parties with "the same efficacy as it did when the goods were on the ship at "sea. In those circumstances, the position of an agent or independent contractor, such as the defendant, has clearly been "defined by the House of Lords. Upon what theory in law the "House reached its conclusion it is not necessary for this court "to consider. Whether the defendant be regarded as an agent "or as a bailee holding under a bailment upon terms is "immaterial. The decision of the court accorded to the defendant in that case the same protection as was given by the "contract to the shipowner, and that decision governs the facts "of the present case." The other two members of the court, one of whom was Owen J., agreed with Street C.J., founding their judgments on the *Elder Dempster* case.[18]

From what I have said above, it seems reasonably clear that it is now established law that an independent contractor, and possibly also a servant employed by a shipowner to deal with goods which at the material time are subject to a contract of carriage between the shipowner and the goods owner, if sued in tort by the goods owner, is, in appropriate circumstances, entitled in relation to his normal dealings with such goods to claim the protection of exception clauses in the contract of carriage between the goods owner and the shipowner. The point which I have to decide is whether the same principle can properly be applied, or ought to be applied, to contracts for the carriage of passengers. I start with the general proposition that every person injured by the tortious act of another with whom he is not in contractual relationship has a right to pursue his legal remedy against the tortfeasor. The *Elder Dempster* case[19] decides that in certain circumstances the relationship between the parties may be such that the tortfeasor, when sued in tort, is entitled to contend successfully in the case of damage to goods either that the goods were impliedly bailed in terms that exempt him from liability, or that his employer has impliedly contracted on his behalf with the goods owner upon terms which exempt him, the tortfeasor, from liability. Inasmuch as the notion of bailment is inappropriate in the case with which I am concerned, I have only to consider whether the argument based upon implied agency can or ought to be applied to the facts of the present case. The argument presented on behalf of the defendants is obviously far-reaching and is one which I should not be disposed to accept unless I were constrained to do so by authority.

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[17] [1951] 2 Ll.Rep. 385, 387.

[18] [1924] A.C. 522.

[19] Ibid.

The *Elder Dempster* case [20] and the other cases to which I have referred, which deal with the carriage of goods, seem to me to have little in common with the facts of the present case. The plaintiff in all those cases confided his goods to the shipowner or charterer, as the case may be, and parted with all control over them until they reached their port of destination and ceased to be carried on the terms of the contract evidenced by the bills of lading. In such circumstances, it is well known to everyone that the shipowner will in all probability employ independent contractors such as stevedores to perform such duties and obligations in regard to the contract of carriage as are normally carried out by independent contractors such as stevedores. It is not difficult to see that it may be proper to afford to such independent contractors the protection which the shipowner would enjoy if he performed the services by his own servants.

The facts of the *Elder Dempster* case [21] were, as I have pointed out, somewhat unusual, and the noble Lords in that case were by no means unanimous in the reasons which they gave for holding that the shipowner was entitled to take advantage of the exception clauses in the bills of lading. Whilst it was no doubt proper in the unusual circumstances of that case to invoke the theory of an implied agency or bailment upon terms, it seems to me to be a very different thing to invoke the same principles in the case now before me. To do so would involve the somewhat startling proposition that every shipping company and, indeed, every person or company making contracts with members of the public, under which such person or company is absolved from liability for the negligence of its servants, must be taken impliedly to contract on behalf of each of its servants that in regard to acts done by such servant in pursuance of the contract the servant shall have the same protection as the employer has stipulated for himself. It is to be observed that there does not appear to be any reported case in which a servant, when sued in tort, has sought to avail himself of contractual exemptions from liability available to his master. No doubt too much importance should not be attached to this fact, as actions for damages against the ordinary servant, at any rate when the claim is a substantial one, are rare because any judgment obtained is likely to be of little value.

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[20] [1924] A.C. 522.

[21] Ibid.

I was referred by Mr. Le Quesne on behalf of the plaintiffs to *Cosgrove* v. *Horsfall.*[22] In that case a bus driver who had been issued by his employers, the London Passenger Transport Board, with a free pass which allowed him to travel on the board's buses subject to a condition that except when travelling on the board's business neither the board nor their servants would be liable to him for injuries sustained, was injured by the negligence of another bus driver in the service of the board. He thereupon sued the negligent driver and was awarded damages by the county court judge. The negligent bus driver appealed unsuccessfully. Du Parcq L.J., in the course of his judgment, said[23]: " It was " said that, in making the contract, or imposing the condition, " the London Passenger Transport Board were acting as agents " for Horsfall, so that he could take advantage of the condition " and rely on it. There was no evidence before the judge on " which he could have found that the board acted as agents for " Horsfall, and, of course, he did not so find. It was not even " proved that Horsfall was in the employment of the board when " the pass, on which the condition is indorsed, was issued to the " plaintiff. If I assume that Horsfall was then in the board's " employment it remains true that there is no evidence from " which agency ought to be inferred. I agree with the judge " that Horsfall ' was not a party to and has no right by virtue " ' of the licence or contract.' " It will be observed that in that case the London Passenger Transport Board, in issuing the free pass to the plaintiff, had specifically provided that when not travelling on the board's business " neither the company *nor their* " *servants* would be liable " to the holder of the pass for injuries sustained. In spite of this specific provision the plaintiff was held entitled to recover against one of their servants for the injuries which he sustained on the ground that the defendant was not a party to the contract between the board and the plaintiff and had no right by virtue of the licence or contract.

In the case now before me there is no specific provision in the " Conditions " that the servants of the company shall not be personally liable to passengers in tort. I am not prepared to assume in the present case that the Peninsular & Oriental Steam Navigation Co. had any intention when inserting wide exception clauses in their forms of passenger ticket to act as the agents of every member of the crews of their vessels and thus to confer upon all their servants the protection against personal liability for negligence which such clauses afforded to the company itself. Such passengers as read the conditions printed on their tickets would be made aware that in the event of an accident they had little hope of obtaining redress from the steamship company, but there is nothing in the terms of the ticket to lead them to suppose, if they paused to consider the matter, that if they sustained injury or loss through the negligence of a member of the crew acting in the course of his ordinary duty they would be precluded from recovering for such injury or loss by a personal action against the tortfeasor by reason of any of the exception clauses on their ticket. There seems to be no good reason why the type of agency which was implied in the *Elder Dempster* case [24] should be extended to apply to the very different facts of the case with which I am dealing and every reason why it should not. In this connexion I would refer to the judgment of Denning L.J. in *Smith & Snipes Hall Farm Ld.* v. *River Douglas Catchment Board* [25] in which he deals with the type of interest which will enable a third party to rely upon the terms of a contract to which he is not a party. I am satisfied that in the present case it is quite impossible to say that any such common interest existed between the members of the crew of a passenger ship and her owners as would entitle the former to avail themselves as against a passenger of clauses in the contract of carriage introduced by the shipowner for his own protection. If a servant is to be contractually protected against personal claims against himself made by members of the public arising out of the servant's own negligence in the course of his duties it would seem to me that this fact should be brought home to members of the public with whom he is deemed so to contract. No doubt in the case with which I am concerned words could have included in the conditions of the ticket which made it clear that in regard to the relevant words of exception the company was acting as the agent of each of its servants. In the absence of any such words I can see no ground, on the facts of the present case, for implying them.

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[22] (1945) 62 T.L.R. 140.

[23] Ibid.

[24] [1924] A.C. 522.

[25] [1949] 2 K.B. 500, 515; sub nom. *Smith* v. *River Douglas Catchment Board*, 65 T.L.R. 628; [1949] 2 All E.R. 179.

I was referred to a passage in the judgment of Denning L.J. in *White* v. *John Warwick & Co. Ld.*[26] in which he made reference to Lord Finlay's speech in the *Elder Dempster* case.[27] The Lord Justice referred to the fact that the clause in the bills of lading in that case "exempted the charterers and the owners "from liability for bad stowage." I have already given reasons based on an examination of the record in the House of Lords in the *Elder Dempster* case[27] for doubting whether this statement is completely accurate and for suggesting that the true view is probably that "the company," that is to say the charterers, were the only persons contractually exempted from liability for bad stowage on the face of the document. In any case, as the Lord Justice himself said, the passage to which I refer had no application to the case he was deciding.

I ought also to mention the very recent case of *Pyrene Co. Ld.* v. *Scindia Navigation Co. Ld.*[28] in which Devlin J. had to consider the rights and liabilities of the plaintiffs who were the sellers and shippers of a fire tender under an f.o.b. contract. The fire tender was dropped and damaged whilst being lifted by the ship's tackle from the quay at the London Docks and before it crossed the ship's rail. The plaintiff sellers were not in direct contractual relationship with the defendant shipping company and sued the defendants for the cost of repairing the tender. Devlin J. held, amongst other things, that in the circumstances of the case the inference should be drawn that all these parties, namely, the sellers, the shipowners, and the buyers of the fire tender, intended that the seller should participate, that is to say, do his part in carrying out the contract of affreightment and that in all the circumstances the sellers must be taken to be parties to the contract of affreightment made between the ship and the buyers. He held that the fire tender was, at the moment when it was damaged, subject to the terms of the bills of lading which was to be issued, which incorporated the Hague Rules and that, accordingly, as against the sellers the ship was entitled to limit its liability in accordance with the provisions of the rules.

I only mention that case because Devlin J. had occasion to consider arguments based upon the *Elder Dempster* case[29] and other cases to which I have referred in this judgment. All these cases concern the right of a third party to the benefit of exception clauses in a contract of carriage to which he is not a party. Passages in Devlin J.'s judgment[30] indicate many of the sets of circumstances in which it is almost inevitable that in the course of the carriage of goods by sea under modern conditions inference of implied agency should be drawn which will afford protection to persons necessarily participating in a complex business transaction. Devlin J. decided the only point in the *Pyrene Co.'s* case[31] with which I am concerned because of the view which he took, and if I may say so with respect, very naturally took, as to the unformulated intention of the participants in the business. Being satisfied as I am on the facts of the case which I have to decide that business efficacy does not require me to imply any such terms in the contract as the defendants contend for, and being satisfied that neither the shipping company nor the plaintiff nor the defendants, if they ever considered the matter, had any intention that such a term should be implied, I think it would be wrong to accede to the arguments advanced on behalf of the defendants based upon the cases to which I have referred.

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[26] [1953] 1 W.L.R. 1285, 1294; [1953] 2 All E.R. 1021.

[27] [1924] A.C. 522.

[28] [1954] 2 Q.B. 402; [1954] 2 All E.R. 158.

[29] [1924] A.C. 522.

I accordingly determine the point of law raised in favour of the plaintiff, who should have her costs.

Judgment for the plaintiff.

The defendants appealed.

A. A. Mocatta Q.C. and *Michael Kerr* for the defendants. The point for consideration is whether a plaintiff who has contracted with shipowners for carriage as a passenger on terms which exempt the shipowners from all risks can get round the terms of that contract by suing the captain and boatswain of the vessel in tort. For the purpose of the present proceedings it may be assumed that the defendant members of the crew were negligent. It is submitted that a servant can, as regards acts done by him in pursuance of a contract made with his employer, claim the same protection as his employer under the contract. Otherwise such an exemption clause would be virtually nugatory, particularly in the case of a limited company, which can only act through its servants or agents. The usual exemption clauses imposed by railway companies and similar undertakings would be ineffective. Under the contract in the present case passengers were carried at their own entire risk, and they must insure themselves against all accidents.

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[30] [1954] 2 W.L.R. 1005, 1015–20.

[31] Ibid.

In *Beaumont-Thomas* v. *Blue Star Lines* [1] Lord Hewart C.J. held that the exemption clause covered only marine risks, but the Court of Appeal reversed his decision and held that the clause was unrestricted.[2] The most important line of authorities on which the defendants rely starts with the well-known case of *Paterson, Zochonis & Co.* v. *Elder Dempster & Co. Ld.*[3] A number of cases followed on that authority. In that case casks of palm oil were crushed by other heavy cargo being loaded above them. In the Court of Appeal, Bankes L.J. and Eve J. held that the ship was unseaworthy. Scrutton L.J., dissenting, held that the damage was due to bad stowage and was therefore covered by the exemption clause in the bills of lading and that the shipowners, although not parties to the contract, were entitled to protection because they took possession of the goods as agents of the charterers. In the House of Lords [4] Viscount Cave took the same view as Scrutton L.J. Viscount Finlay based his decision on the ground that the tort complained of was one committed in the course of rendering the very services provided for in the contract, and therefore whether the principal or agent was sued the liability was limited by the contract. Lord Sumner, while agreeing with the view of Scrutton L.J., preferred the view that it was a case of bailment upon terms and not a bald bailment. It is submitted that whichever view is adopted the defendants in the present case are protected. Their Lordships reversed the majority decision of the Court of Appeal.

In *Mersey Shipping and Transport Co. Ld.* v. *Rea Ld.*[5] Scrutton L.J. stated the finding of the House of Lords in the *Elder Dempster* case [6] as follows: "Where there is a contract "which contains an exemption clause the servants or agents "who act under that contract have the benefit of the exemption "clause. They cannot be sued in tort as independent people, "but they can claim the protection of the contract made with "their employers on whose behalf they are acting. I think that "is the result of the second point in the judgments of Lord "Cave and of Lord Sumner, with whom Lord Dunedin agrees, "in the *Elder Dempster* case.[6]"

[MORRIS L.J. If a passenger asks a steward for a deck chair and the steward assaults the passenger, would he be protected by the clause?]

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[1] [1939] 1 All E.R. 174.

[2] 55 T.L.R. 852; [1939] 3 All E.R. 127.

[3] [1923] 1 K.B. 420.

[4] [1924] A.C. 522.

[5] (1925) 21 Ll.L.R. 375.

[6] [1924] A.C. 522.

He would not be. It would be wilful misconduct and he would not be acting in pursuance of his duties.

[DENNING L.J. We have to consider this clause, and it does not say anything about wilful misconduct.]

[MORRIS L.J. The words of the clause are very wide and are sufficient to cover theft, by a member of the crew, of a passenger's jewels.]

If a servant is carrying out the contract and is acting in the course of his employment he is entitled to the same protection as his employer. The court can draw that distinction in applying the principle laid down in the *Elder Dempster* case.[6]

[DENNING L.J. Public policy would not allow a thief or a steward who so conducted himself to rely on the protection of the clause.]

[JENKINS L.J. We are asked to say that the clause gives protection to the company, its servants and agents.]

Yes. In the *Elder Dempster* case [6] protection was given to a person who was not a party to the contract. Here there is an implied contract between the plaintiff and the crew. In two Australian cases the decision of the House of Lords as stated by Scrutton L.J. in *Mersey Shipping and Transport Co. Ld.* v. *Rea Ld.*[7] was applied: see *Gilbert Stokes and Kerr Proprietary Ld.* v. *Dalgety & Co.*[8]; *Waters Trading Co.* v. *Dalgety & Co.*[9] The decision in *Cosgrove* v. *Horsfall* [10] is against the present defendants, but the decision of the House of Lords in the *Elder Dempster* case [11] was not cited to the court. It is therefore submitted that this court should not follow *Cosgrove* v. *Horsfall*.[10] There is no good reason for any distinction between negligent damage to goods and negligent damage to persons, since the liability of carriers of goods is in several respects higher than that of carriers of passengers. Strange results would follow if such a distinction were drawn. The judgments in the House of Lords in the *Elder Dempster* case [11] show that their Lordships felt that they were taking new ground and establishing a new concept of law.

[The following cases were also referred to: *Vita Food Products Inc.* v. *Unus Shipping Co.*[12]; *White* v. *John Warwick & Co.*[13]; *Pyrene Co. Ld.* v. *Scindia Navigation Co. Ld.*[14]; *Fosbroke-Hobbes*

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[6] [1924] A.C. 522.
[7] 21 Ll.L.R. 375.
[8] (1948) 81 Ll.L.R. 337.
[9] [1951] 2 Ll.Rep. 385.
[10] (1945) 62 T.L.R. 140.
[11] [1924] A.C. 522.
[12] [1939] A.C. 277.
[13] [1953] 2 All E.R. 1021.
[14] [1954] 2 W.L.R. 1005.

v. *Airwork Ld.*[15]; *Andrews* v. *Home Flats*[16]; *Baker* v. *Carrick*[17]; *Said* v. *Butt*[18]; and *Cavenagh* v. *Such*[19]; and Salmond on Torts, 11th ed., pp. 9, 10 and 11.]

J. G. Le Quesne for the plaintiff. The defence is based on a contract to which the defendants are not parties and which by its terms does not purport to confer any benefit on them. It was argued that there are principles of law which entitle the defendants to protection by a contract of this kind, but public policy cannot be left out of consideration. This exemption clause, if it were sought to be applied to the carriage of passengers on land, would be void. It is submitted that, with the single exception of Scrutton L.J.'s statement, one looks in vain for any statement of a general principle in the law of agency of the kind contended for by these defendants. The word "privilege" states the distinction between rights existing by law and rights created by contract. Although a Minister may be protected from being sued, his subordinates are not immune: see *Williams* v. *Commissioner for Main Roads*.[20] It is only in the decision of Scrutton L.J. in the *Elder Dempster* case[21] that one finds that the immunities which the principal has taken unto himself by contract will be passed on to his agents. It is submitted that that is not what was decided by the House of Lords; one does not get from their Lordships' speeches any clear decision establishing the principle for which the defendants here are contending.

Langton J.'s decision in *The Kite*[22] does not give much help because that judge said that he could not get a clear line from the *Elder Dempster* case.[23] The two New South Wales cases to which reference was made also give no assistance, because Owens J. did not take into account the fact that the judgments in the House of Lords are based on the two lines of agency and bailment. Bailment does not apply in the present case, and the agency principle is of limited application and does not touch this case. The propositions in the *Elder Dempster* case[23] concerning agency do not fit in with the general law of agency. The courts have always confined unilateral exemption clauses within their essential limits, and public policy requires exemption clauses to be confined to classes actually named. In the present case no contractual arrangement is made beyond the original contract for the protection of the employer.

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[15] [1937] 1 All E.R. 108.

[16] [1945] 2 All E.R. 698.

[17] [1894] 1 Q.B. 818.

[18] [1920] 3 K.B. 497; 36 T.L.R. 762.

[19] (1815) 1 Price 328.

[20] 40 S.R.N.S.W. 472.

[21] [1923] 1 K.B. 420.

[22] [1933] P. 154.

[23] [1924] A.C. 522.

[MORRIS L.J. If I hand over some clothes to Mr. X, the manager of the X Laundry Ld., knowing that he will deal with them throughout, and I have a contract with the X Laundry Ld. whereby the latter is exempted from liability for negligence, do you say that I could disregard the contract and sue X personally in tort if my clothes were negligently damaged?]

Yes. The dictum of Scrutton L.J. in *Mersey Shipping and Transport Co.* v. *Rea* [24] is too wide and receives no support from the judgments in the House of Lords. There was a special relationship and interest between the parties in the *Elder Dempster* case [25] which is not applicable as between the shipowner, the ship's captain and boatswain, and the passenger. In *Smith and Snipes Hall Farm Ld.* v. *River Douglas Catchment Board* [26] Denning L.J. gave examples of the interest required to enable a third party to claim the benefit of the terms of a contract, and there is no such interest here. None of the cases analogous to the *Elder Dempster* case [25] to which reference has been made assist the defendants. Only in three cases has the authority of the *Elder Dempster* case [25] been applied, and in each of them, it is submitted, the line of bailment could have been applied.

The decision in *Cosgrove* v. *Horsfall* [27] is admittedly fatal to the defence. In that case a bus driver was issued by his employers with a free pass which allowed him to travel during his off-duty hours, subject to the condition that neither his employers nor their servants or agents would be liable for any injuries sustained. He was injured by the negligence of another employee and it was held that the negligent employee could not claim the benefit of the exemption clause. It is submitted that the *Elder Dempster* decision [28] must be limited to the carriage of goods by sea and should not be extended to the carriage of passengers. It is quite impossible on the facts to imply that the shipowners were acting as agents for the master and crew when making the contract.

Mocatta Q.C. replied.

Cur. adv. vult.

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[24] (1925) 21 Ll.L.R. 375.

[25] [1924] A.C. 522.

[26] [1949] 2 K.B. 500; sub nom. *Smith* v. *River Douglas Catchment Board*, 65 T.L.R. 628; [1949] 2 All E.R. 179.

[27] 62 T.L.R. 140.

[28] [1924] A.C. 522.

November 5. The following judgments were read.

DENNING L.J. In June, 1952, Mrs. Adler, a widow, who keeps a shop, decided to go for a cruise upon the P. & O. Steamship *Himalaya*. She booked her passage through the travel agents, Thomas Cook & Son. She travelled first-class and paid £188 for the trip. In return the steamship company issued her with a first-class passage ticket by virtue of which she joined the ship at Southampton and sailed on the cruise. On July 16, 1952, the ship reached Trieste and Mrs. Adler went ashore. A gangway was placed horizontally from the ship to a gantry on the quay. She went ashore across that gangway. When she returned to the ship, she was walking along the gangway and had got about half-way across when suddenly the gangway came adrift from the gantry at the shore end, and it fell down against the side of the ship. She was thrown on to the wharf below, a distance of 16 feet, and suffered severe injuries, including a broken leg, broken pelvis, and broken ribs. She claims damages against the master and the boatswain of the ship alleging that they were negligent in that they failed to see that the gangway was properly secured. They deny this and say that the gangway was properly placed and secured and that the cause of the accident was that there was an exceptionally violent gust of wind which suddenly blew the ship several feet off the quay, dragging the gangway with it.

On those allegations there is obviously a serious issue as to whether the master and the boatswain were negligent or not. The trial of that issue would be very expensive. The master and the boatswain say that it is unnecessary to go to that expense because in any event, even if they were negligent, they are protected by the exception clause in the ticket. The clause says that "Passengers and their baggage are carried at passengers' "entire risk" and "The company will not be responsible for "and shall be exempt from all liability in respect of any damage "or injury whatsoever of or to the person of any passenger." Mrs. Adler admits that if she had sued the steamship company the exemption clause would have protected the company; but she says that it does not protect the master and boatswain. Indeed, it is for that very reason, so as to overcome the exemption clause, that she has sued the master and boatswain and not the steamship company.

This raises a point of law which the court has ordered to be tried first before the facts are gone into. We must assume for the purposes of the argument that the master and the boatswain were personally guilty of negligence and are, prima facie, liable in tort for their wrongdoing. The question is whether they are protected by the exemption clause. It is an important question, because the steamship company say that, as good employers, they will stand behind the master and boatswain and meet any damages or costs that may be awarded against them. They say that if Mrs. Adler's claim is admissible, it means that a way has been found of getting round the exemption clause which no one has ever thought of before.

I pause to say that if a way round has been found it would not shock me in the least. I am much more shocked by the extreme width of this exemption clause, which exempts the company from all liability whatsoever to the passenger. It exempts the company from liability for any acts, default or negligence of their servants under any circumstances whatsoever, which includes, I suppose, their wilful misconduct. And this exemption is imposed on the passenger by a ticket which is said to constitute a contract, but which she has no real opportunity of accepting or rejecting. It is a standard printed form upon which the company insist and from which they would not depart, I suppose, in favour of any individual passenger. The effect of it is that, if the passenger is to travel at all, she must travel at her own risk. She is not even given the option of travelling at the company's risk on paying a higher fare. She pays the highest fare, first-class, and yet has no remedy against the company for negligence. Nearly 100 years ago Blackburn J., in a memorable judgment, said that a condition exempting a carrier wholly from liability for the neglect and default of his servants was unreasonable: see *Peek* v. *North Staffordshire Railway Co.*[1] I think so too.

Nevertheless, no matter how unreasonable it is, the law permits a carrier by special contract to impose such a condition (see *Ludditt* v. *Ginger Coote Airways Ld.*[2]) except in those cases where Parliament has intervened to prevent it. Parliament has not so intervened in the case of carriers by sea. The steamship company are therefore entitled to the protection of these clauses, as indeed this court held in *Beaumont-Thomas* v. *Blue Star*

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[1] (1863) 10 H.L.C. 473, 517.

[2] [1947] A.C. 233; 63 T.L.R. 157; [1947] 1 All E.R. 328.

Line.[3] The question is whether the master and the boatswain —the actual wrongdoers—are entitled also to the protection of them.

I can imagine that some lawyers would decide in Mrs. Adler's favour out of hand: and for a reason which appears at first sight both simple and sufficient. It is this: the master and boatswain were not parties to the contract of carriage and cannot therefore claim the benefit of the exemption clause in it, because no one can enforce a contract to which he was not a party. It was reasoning on those lines which appealed to the court in *Cosgrove* v. *Horsfall*[4]: and if that decision was right, it concludes the case in Mrs. Adler's favour. Mr. Mocatta has, however, urged us to say that that decision was wrong. It is, he says, inconsistent with the decision of the House of Lords in *Elder Dempster & Co. Ld.* v. *Paterson Zochonis & Co. Ld.*,[5] which was not cited to the court. He says further that, in the case of carriage of goods by sea, it is well established that the master and crew are entitled to the protection of the exemption clauses: and that there is no reason why they should not also be so entitled in the carriage of passengers.

This is a serious argument which makes it necessary for us to consider the cases on carriage of goods. They undoubtedly show that when a carrier issues a bill of lading for goods, the exception clauses therein enure for the benefit, not only of the carrier himself, but also for the benefit of the shipowner, the master, the stevedores and any other persons who may be engaged in carrying out the services provided for by the contract. Such persons are not parties to the contract of carriage, but, nevertheless, when they are rendering their services they are protected by the exceptions contained therein; and this is so, even though the clauses are not expressed to be made for their benefit, at any rate not in so many words. It follows that if they are guilty of negligence in rendering their services and are sued in tort, they can nevertheless rely on the exceptions to relieve them from liability. These propositions have been established in England by *Elder Dempster & Co. Ld.* v. *Paterson Zochonis & Co. Ld.*,[6] in Australia by *Gilbert Stokes & Kerr Pty.* v. *Dalgety & Co.*[7] and *Waters Trading Co.* v. *Dalgety & Co.*,[8] and in the United States of

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[3] (1939) 64 Ll.L.R. 155; 55 T.L.R. 852; [1939] 3 All E.R. 127.

[4] (1945) 62 T.L.R. 140.

[5] [1924] A.C. 522; 40 T.L.R. 464.

[6] [1924] A.C. 522.

[7] (1948) 81 Ll.L.R. 337.

[8] [1951] 2 Ll.Rep. 385.

America by *Collins* v. *Panama*[9] and *Ford* v. *Jarka*.[10] The propositions are further supported by the rules in the Carriage of Goods by Sea Act, 1924. Article IV (2) exempts "the carrier" and "the ship" from divers responsibilities, and Article IV (5) limits their liability in any event to £100 per package. Neither the master nor the crew nor the stevedores are expressly given the benefit of these exceptions and limitations, but Parliament must have intended that they should have the benefit of them.

There was much discussion before us as to the true principle underlying these propositions. No one doubted their correctness, but the difficulty is to reconcile them with the proposition that no one can claim the benefit of a contract except a party to it. The speeches in the House of Lords in the *Elder Dempster* case[11] are so compressed on this point that we have a variety of reasons to choose from. One suggestion, which was much canvassed, was that, in addition to the contract of carriage between the goods owner and the carrier (which was evidenced by the bill of lading), there were a number of collateral contracts between the goods owner and all the various persons concerned in the carriage. Take, for instance, the stevedores. It was said that there was a collateral contract between the goods owner and the stevedores whereby the goods owner agreed that the stevedores should have the benefit of the exceptions. This collateral contract was said to be made by the carriers either as agents for the goods owner or as agents for the stevedores or alternatively to arise out of a bailment upon terms. Take next the crew. It was said that there were collateral contracts with each of them, although there was clearly no bailment to each one.

This suggestion of a large number of collateral contracts does not appeal to me, for the simple reason that there are never any such contracts in fact. The goods owner makes one contract only, namely, his contract with the carrier. He makes no contract with anyone else. In particular he makes no contract with the stevedores, or with the master or the crew. It seems to me that these supposed collateral contracts are nothing but a legal fiction devised to give the stevedores and the others protection under a contract to which they were not parties. The truth is that there was only one contract, namely, the contract evidenced by the bill of lading: and the reason why the stevedores and others are protected is because, although they were not parties to the contract, nevertheless they participated in the performance of it, and the exception clause was made for their benefit whilst they were so performing it. The clause was not made expressly for their benefit, it is true, but nevertheless it was by necessary implication, which is just as good: and they have a sufficient interest to entitle them to enforce it. Their interest lies in this: they participated in so far as it affected them and can take those benefits of it which appertain to their interest therein. It is one of those cases—by no means rare—where a third person is entitled to enforce a contract made for his benefit. I referred to some of these cases in *Smith & Snipes Hall Farm* v. *River Douglas Catchment Board*,[12] and Devlin J. has recently mentioned some more in his illuminating judgment in *Pyrene Co.* v. *Scindia Navigation Co.*[13]

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[9] (1952) 197 Fed.Rep. 983.
[10] [1954] A.M.C. 1095.
[11] [1924] A.C. 522.

Such being the rule in respect of goods, the question is whether a similar rule applies to the carriage of passengers. In principle it clearly does. A good instance is *Hall* v. *North Eastern Railway Co.*,[14] which was decided 80 years ago. A drover was given a free pass to take some sheep on the railway from Scotland to England. The North British Company gave him a ticket which said that, as he travelled free, he travelled at his own risk. His journey took him over an English line, the North Eastern Railway, and he was injured by the negligence of the servants of the English company, not by the servants of the Scottish company. It was admitted that there was only one contract, namely, the contract with the Scottish company. The English company was not a party to that contract but, nevertheless, it was entitled to the benefit of the exception which it contained. The reason was, in Blackburn J.'s words, that the drover " must be taken to have assented that the ticket should " protect the North Eastern Company just as well as the North " British." In short, it was a necessary implication that the English company should be protected. I should add that in Blackburn J.'s judgment, as reported in the Law Reports, there are some words which suggest a contract between the drover and the English company, but the suggestion seems to me unreal and I notice that the Law Journal does not contain those words. In further support of the rule in respect of passengers, I would refer to the Carriage by Air Act, 1932. The provisions under that Act contain certain exemptions and limitations in favour of the "carrier." The pilot of the aircraft is not expressly given the benefit of them, but Parliament must have intended that he should have the same protection as the carrier.

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[12] [1949] 2 K.B. 500, 515; sub nom. *Smith* v. *River Douglas Catchment Board*, 65 T.L.R. 628; [1949] 2 All E.R. 179.

[13] [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[14] (1875) L.R. 10 Q.B. 437; 44 L.J.Q.B. 164.

My conclusion therefore is that, in the carriage of passengers as well as of goods, the law permits a carrier to stipulate for exemption from liability not only for himself but also for those whom he engages to carry out the contract: and this can be done by necessary implication as well as by express words. When such a stipulation is made, it is effective to protect those who render services under the contract, although they were not parties to it, subject however to this important qualification: The injured party must assent to the exemption of those persons. His assent may be given expressly or by necessary implication, but assent he must before he is bound: for it is clear law that an injured party is not to be deprived of his rights at common law except by a contract freely and deliberately entered into by him; and all the more so when the wrongdoer was not a party to the contract, but only participated in the performance of it.

In all cases where the wrongdoer has escaped it will be found that the injured party assented expressly or by necessary implication to forgo his remedy against him. In the case of goods it is not difficult to infer an assent because the owner of the goods habitually insures them against loss or damage in transit. If the carrier is protected by an exemption clause, so should his servants be, leaving the owner to recover against the insurance company. As Scrutton L.J. said in the *Elder Dempster* case [15]: "Were it otherwise there would be an easy "way round the bill of lading"; and as Lord Finlay said [16]: "It "would be absurd that the owner of the goods could get rid of "the protective clauses of the bill of lading . . . by suing . . . "in tort." In the case of passengers, however, it is not so easy to infer an assent. It was inferred in *Hall* v. *North Eastern Railway Co.*[17] but not in *Cosgrove* v. *Horsfall*,[18] even though the clause there purported expressly to exempt the servant. At least, that seems to me the correct explanation of those cases.

Applying those principles to the present case, the important thing to notice is that the steamship company only stipulated for exemption from liability for themselves. They did not in

Denning is perfectly correct ??? !

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[15] [1923] 1 K.B. 420, 441.

[16] [1924] A.C. 522, 548.

[17] L.R. 10 Q.B. 437

[18] 62 T.L.R. 140.

terms stipulate for exemption for their servants or agents, and I see no reason to imply any such exemption. The servants or agents are therefore not excused from the consequences of their personal negligence: compare *The City of Lincoln* (*Masters and Owners*) v. *Smith*.[19]

In any case, even if the company intended that the stipulation should cover their servants, nevertheless I see nothing whatever to suggest that Mrs. Adler knew of their intention or assented to it. If she read the conditions of the ticket (which she probably did not) and considered the possibility of being injured by the negligence or default of the company's servants (which I trust she thought unlikely) she might well think that her remedy against the company was barred, but she would not think her remedy against the servants was also barred. Suppose a steward on a liner were to strike a passenger or falsely to imprison her, or injure her by some wilful misconduct, then, albeit it was done in the course of his employment, he could not claim the protection of the clause, for the simple reason that the passenger never agreed to his being exempted. She could sue the steward personally, even though her remedy against the company was barred. So also if the steward is negligent in the course of his employment, for there is no difference in principle between the cases. The passenger has not agreed to forgo his remedy against the actual wrongdoer and can still pursue it.

The result in my opinion is that Mrs. Adler can pursue her claim against the master and the boatswain without being defeated by the exemption clause. I think the appeal should be dismissed.

JENKINS L.J. stated the facts and continued: If the matter were free from authority I would have little hesitation in agreeing with the conclusion of Pilcher J. For the present purpose it must be assumed that the defendants were in fact guilty of the negligence alleged against them in the statement of claim, in the shape of the various wrongful acts or omissions particularized under paragraph 6, and the defendants must show that even on that assumption the action must fail by reason of the exempting provisions of the ticket.

On this assumption the plaintiff, while lawfully using the gangway, was injured by the tortious acts or omissions of the defendants, who were the servants of the company which had contracted with the plaintiff to carry her as a passenger. If the contract with the company had contained no exempting provisions, the plaintiff would, as I understand the law, have had separate and distinct rights of action (*a*) against the company for breach of contract or, alternatively, in tort, on the principle of "respondeat superior," and (*b*) against the defendants as the persons actually guilty of the tortious acts or omissions which caused the damage. The plaintiff's right of action against the company is clearly taken away by the exempting provisions of the contract, but I fail to see how that can have the effect of depriving her also of her separate and distinct right of action against the defendants as the actual tortfeasors. There is certainly no express provision purporting so to deprive her, and in the absence of any express provision to that effect I see no justification for implying one. The exempting provisions in terms apply only to the liability of the company, without any reference to the liability of servants of the company for the consequences of their own tortious acts. Even if these provisions had contained words purporting to exclude the liability of the company's servants, non constat that the company's servants could successfully rely on that exclusion in proceedings brought against them by some party injured by their tortious conduct, for the company's servants are not parties to the contract. But as it is, not only are the company's servants not parties to the contract but the contract does not even mention their liability. I find it quite impossible to accept the suggestion that the contract between the company and the plaintiff must be taken to have been entered into by the company not only on its own behalf but also on behalf of all its servants. There is nothing whatever in the terms of the contract to support this theory, and even if it were tenable I do not see how it would assist the defendants, inasmuch as the only liability it excludes is the liability of the company.

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[19] [1904] A.C. 250.

Finally, I take it to be the law that a defendant sued in tort who claims that the plaintiff has by some contract with the defendant deprived himself in advance of his right of action in respect of the wrong done him must show that the contract relied on does either expressly or by necessary implication clearly deprive the plaintiff of such right. The contract here relied on to my mind falls far short of this test so far as the plaintiff's right of action against the defendants is concerned.

A good deal was said in the course of the argument before us about the absurdity of a stipulation relieving an employer of his liability for the negligence of his servant while leaving untouched the servant's liability for that same negligence. I do not follow this. If there is no exempting stipulation at all, then both master and servant are liable, and either can be sued at the option of the injured party. If there is a contract exempting the master but not the servant then the servant's liability remains as it was. The master may find this result inconvenient if he feels impelled, either from motives of expediency or from a sense of moral obligation, to indemnify the servant. But, if so, the answer is simple. He should have seen that the contract was so framed as to exempt his servant from liability as well as himself. To my mind, it is far more absurd to impute to a passenger on a ship, who has contracted with a shipowner for a given voyage in terms which exempt the shipowner from liability for his servant's negligence, an intention thereby to deprive himself of all right to redress against the servants of the shipowner for any and every negligent act or omission which may be committed by such servants in the course of their duties, however gross the negligence and however grave the resulting damage to the passenger may be. Accordingly, if left free to do so by the authorities, I would dismiss the appeal.

The conclusion which I have thus provisionally reached accords with the decision of this court in *Cosgrove* v. *Horsfall*.[20] In that case the plaintiff, Cosgrove, an omnibus driver employed by the London Passenger Transport Board, was provided by the board with a free pass which allowed him to travel on the board's omnibuses subject to the condition that, except when he was travelling on the board's business, neither the board nor their servants would be liable to him or his representatives " for loss " of life, injury or delay, or of damage to property however " caused." While the plaintiff was travelling otherwise than on the business of the board on one of the board's omnibuses it came into collision with another of the board's omnibuses and the plaintiff was injured through the negligence of the driver of one of the omnibuses. The plaintiff sued the two drivers in the county court. The county court judge held that one of the two drivers, the defendant Horsfall, was to blame for the accident and awarded the plaintiff £20 damages against that defendant, who appealed unsuccessfully to this court. It is, I think, right to quote at some length from the judgment of du Parcq L.J., with which the other members of the court, Scott and Morton L.JJ., expressed their concurrence.

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[20] 62 T.L.R. 140.

du Parcq L.J. said [21]: " The plaintiff in this case has suffered " injury and damage by reason of the negligence of the defendant " Horsfall. Why, then, should he not recover damages against " that defendant? The only answer is that the plaintiff is bound " by contract, or, alternatively, by a condition attached to a " licence, not to hold the defendant liable. The judge held " that this defence could not avail the defendant Horsfall, since " he was not a party to the contract and did not grant the " licence or impose the condition. At first sight this decision " seems to be plainly right, and to be founded on an elementary " principle of our law. It has, however, been criticised on diverse " grounds and with much ingenuity. In my opinion the attack " on it wholly failed. It was said that, in making the contract, " or imposing the condition, the London Passenger Transport " Board were acting as agents for Horsfall, so that he could take " advantage of the conditions and rely on it. There was no " evidence before the judge on which he could have found that the " board acted as agents for Horsfall, and, of course, he did not so " find. It was not even proved that Horsfall was in the employ- " ment of the board when the pass, on which the condition is " indorsed, was issued to the plaintiff. If I assume that Horsfall " was then in the board's employment it remains true that there " is no evidence from which agency ought to be inferred. I agree " with the judge that Horsfall 'was not a party to and has no " 'right by virtue of the licence or contract.' It was further " argued for Horsfall that the plaintiff was bound to produce and " rely on his pass in order to show that he was lawfully in the " omnibus when he was injured, and that, having once produced " it and relied on it, he must be held bound by all its terms, " so that he could not ask the court to hold any servant of the " board liable in respect of his injury or damage. Thus, it was " said, Horsfall must escape. We heard much of 'blowing hot " 'and cold' and of 'approbating and reprobating,' and it would " seem that the latter expression is not yet as out-moded as in " 1940 Lord Atkin supposed it would become: see *United* " *Australia Ld.* v. *Barclays Bank Ld.* [22] In the end it appeared " (if I rightly understood the argument) that the submission was " founded on the equitable doctrine of election. In my opinion " Horsfall cannot rely on any such doctrine here. In order to " show that the driver of the omnibus was under a duty to the

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[21] 62 T.L.R. 140.

[22] [1941] A.C. 1, 32; 57 T.L.R. 13, 21; [1940] 4 All E.R. 20.

"plaintiff to take reasonable care for his safety, all that the plaintiff had to prove was that at the time of the accident he was "lawfully in the omnibus. It may be that it was necessary to "produce the pass in order to show that he was in the omnibus "with the consent of the board, and, no doubt, its production "reveals the fact that after the accident had happened the "plaintiff broke one of the conditions by which, as between the "board and himself, he was bound. But this cannot retrospectively make him a trespasser, or invalidate his claim to have "been a passenger with the consent of the board. There is, in "my opinion, nothing in the point."

I understand du Parcq L.J.'s reference to the plaintiff's breach of one of the conditions by which as between the board and himself he was bound, to be directed to the fact that the condition there in question stipulated that neither the board nor their servants should be liable, an element in the case then before the court which has no counterpart here, as in the present case the exemption is in terms accorded only to the company itself. *Cosgrove* v. *Horsfall* [23] seems to me to be directly in point and, prima facie, it must be our duty to follow that decision as a decision of this court which is binding upon us, with the result that the present appeal must fail.

It was, however, strenuously argued on behalf of the defendants that *Cosgrove* v. *Horsfall* [23] is in conflict with the earlier decision of the House of Lords in *Elder Dempster & Co. Ld.* v. *Paterson, Zochonis & Co. Ld.*,[24] which apparently was not cited in *Cosgrove* v. *Horsfall*,[25] and which is relied on for the defendants as establishing the general proposition that where A contracts to render services to B on terms that A is not to be liable to B for damage caused by the negligence of A's servants or agents, and in the course of the performance of the contract A's servant or agent is guilty of negligence causing damage to B, A's servant or agent is entitled to the same immunity from suit as is accorded to A, his master or principal, by the exempting condition, and this notwithstanding that the negligence of the servant or agent is such as would clearly have entitled B to maintain an action against him in tort apart from the exempting condition. It would seem that the only limit to be placed on this sweeping proposition is that the negligence of the servant or agent must consist in something done or omitted by him in the course of the performance of the contract, a limit the precise scope of which is by no means easy of definition. If *Cosgrove* v. *Horsfall* does indeed conflict with the *Elder Dempster* case, and if the *Elder Dempster* case does indeed establish the general proposition stated above, then it must be our duty to reject *Cosgrove* v. *Horsfall* as of no authority, to follow the *Elder Dempster* case, and accordingly to allow this appeal.

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[23] 62 T.L.R. 140.

[24] [1924] A.C. 522.

[25] 62 T.L.R. 140.

It is therefore necessary to examine the *Elder Dempster* case in some detail. The facts were somewhat complicated and unusual. The defendants, Elder Dempster & Co. Ld., employed a number of ships in the West African trade, which included the carriage of palm oil in casks from West African ports to this country. They hired the use of the steamship *Grelwen* on time charter from her owners, the defendants, Griffiths Lewis Steam Navigation Co. Ld., in order to run her as one of their line of steamships engaged in this trade. The plaintiffs, Paterson, Zochonis & Co. Ld., were the owners of a quantity of casks of palm oil which were taken on board the *Grelwen* at two West African ports for carriage to Hull, under bills of lading issued in the names of "The African Steamship Co. and the British "and African Steam Navigation Co. Managers Elder Dempster "& Co." The bills of lading contained clauses which provided that "the shipowners hereinafter called the company," should not be liable for loss or damage arising from a variety of happenings, which for the present purpose I need not particularize beyond saying that they had the effect of exempting "the "company" (i.e., by definition "the shipowners") from liability for damage due to the negligent stowage of the goods by the servants or agents of "the company." The bills were signed by the master of the *Grelwen* as "agent of the company." Large quantities of palm kernels in bags were stowed above the casks of oil and as there were no 'tween-decks to take the weight of these bags, it bore directly upon the casks, with the result that many of the casks were crushed and, in consequence, much of the oil escaped and was lost. It appears that ships regularly engaged in the West African trade were usually fitted with 'tween-decks for the very purpose of relieving any casks of palm oil carried from the weight of superincumbered cargo. In these circumstances, Paterson, Zochonis & Co. Ld. (whom I will call "the "shippers") sued Elder Dempster & Co. Ld., the African Steamship Co., and the British and African Steam Navigation Co. (whom I will call collectively "the charterers") and also the

Griffiths Lewis Steam Navigation Co. Ld. (whom I will call "the *Grelwen's* owners") for damage in respect of the loss of the oil.

The claim was based, in effect, on two grounds, viz.: (*a*) that the defendants had been negligent in stowing the plaintiffs' oil, and (*b*) that the ship was unseaworthy, in that it was structurally unfit for the carriage of the plaintiffs' oil. Rowlatt J. held that the ship was unseaworthy for the carriage of this cargo, and that none of the exceptions in the bills of lading covered a claim based on unseaworthiness. He gave judgment for the plaintiffs accordingly.

On appeal to the Court of Appeal,[26] the court, by a majority (Bankes L.J. and Eve J., Scrutton L.J. dissenting), upheld Rowlatt J.'s decision. In his dissenting judgment Scrutton L.J., after rejecting the shippers' claim so far as based on unseaworthiness, dealt with their contention that the loss was due to bad stowage. On this part of their case the shippers admitted that the charterers were protected from liability by the exceptions in the bills of lading, but contended that the *Grelwen's* owners were liable in tort, on the ground that the master and crew were in the service of the *Grelwen's* owners as owners of the ship, that their conduct in putting an excessive weight on the palm oil barrels amounted to a tort for which the *Grelwen's* owners were liable as having been committed by their servants, and that the *Grelwen's* owners, not being parties to the bills of lading, could not claim the benefit of the exceptions contained in them. In dealing with this contention Scrutton L.J. said[27]: "To this "counsel for the owner made reply that the owner in the case of "a time charter like the present one was not in possession of the "goods. This in my opinion is contrary to all the authorities, of "which *Omoa & Cleland Coal and Iron Co.* v. *Huntley*[28] is a "type. The real answer to the claim is in my view that the "shipowner is not in possession as a bailee, but as the agent of a "person, the charterer, with whom the owner of the goods has "made a contract defining his liability, and that the owner as "servant or agent of the charterer can claim the same protection "as the charterer. Were it otherwise there would be an easy "way round the bill of lading in the case of every chartered ship; "the owner of the goods would simply sue the owner of the "ship and ignore the bill of lading exceptions, though he had "contracted with the charterer for carriage on those terms and

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[26] [1923] 1 K.B. 420.
[27] Ibid. 441.
[28] (1877) 2 C.P.D. 464.

"the owner had only received the goods as agent for the "charterer."

On appeal to the House of Lords,[29] the House by a majority (Viscount Cave, Lord Dunedin, Lord Sumner and Lord Carson; Viscount Finlay dissenting) reversed the decision of the Court of Appeal, holding that the loss was due to bad stowage and not to unseaworthiness, and that the claim in tort against the *Grelwen's* owners failed because they were (as Scrutton L.J. had held) entitled to the benefit of the exception of liability contained in the bills of lading. So far as this claim in tort was concerned, Viscount Finlay agreed with the rest of their Lordships, so that the decision may be said to have been unanimous as to the result on that part of the case, though there were differences of some importance in the reasoning by which they severally arrived at their conclusion. Viscount Cave said[30]: "I do not think that "this argument should prevail. It was stipulated in the bills of "lading that 'the shipowners' should not be liable for any "damage arising from other goods by stowage or contact with "the goods shipped under the bills of lading; and it appears to "me that this was intended to be a stipulation on behalf of all "the persons interested in the ship, that is to say, charterers "and owners alike. It may be that the owners were not directly "parties to the contract; but they took possession of the goods "(as Scrutton L.J. says) on behalf of and as the agents of "the charterers, and so can claim the same protection as their "principals."

Viscount Finlay said[31]: "It appears to me that if the "plaintiffs are to succeed it must be upon the bill of lading. "The owners of the goods put them on board the *Grelwen* to be "carried on the terms of the bill of lading. It is said that the "imposition of the weight of the kernels on the top of the palm "oil barrels was a wrongful act, resulting in the destruction of "the barrels and the loss of the oil, and that for this wrongful "act, committed by their servants, the shipowners are liable, "apart from contract altogether, so that the plaintiffs, in "claiming from the shipowners, would not be hampered by the "conditions of the bill of lading. This contention seems to me "to overlook the fact that the act complained of was done in "the course of the stowage under the bill of lading, and that the "bill of lading provided that the owners are not to be liable for

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[29] [1924] A.C. 522.

[30] Ibid. 533.

[31] Ibid. 547.

"bad stowage. If the act complained of had been an independent "tort unconnected with the performance of the contract "evidenced by the bill of lading, the case would have been "different. But when the act is done in the course of rendering "the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the "form of the action and whether owner or charterer be sued. "It would be absurd that the owner of the goods could get rid "of the protective clauses of the bill of lading, in respect of all "stowage, by suing the owner of the ship in tort. The Court "of Appeal were, in my opinion, right in rejecting this contention, which would lead to results so extraordinary as those "referred to by Scrutton L.J. in his judgment."

Lord Sumner (with whom Lord Dunedin concurred) said [32]: "It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage "to the United Kingdom amount to a bailment upon terms, "which include the exceptions and limitations of liability "stipulated in the known and contemplated form of bill of "lading. It may be, that the vessel being placed in the Elder, "Dempster & Co.'s line, that the captain signs the bills of "lading and takes possession of the cargo only as agent for the "charterers, though the time charter recognizes the ship's "possessory lien for hire. The former I regard as the preferable "view, but, be this as it may, I cannot find here any such bald "bailment with unrestricted liability, or such tortious handling "entirely independent of contract, as would be necessary to "support the contention." Lord Carson expressed his concurrence in the judgments of Lord Cave and Lord Sumner.

It will be seen that Lord Cave based himself in part at all events on the view that the stipulation that "the shipowners" should not be liable for (to put it shortly) bad stowage, was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, both the charterers and the *Grelwen's* owners; and while he added that the *Grelwen's* owners took possession of the goods (as Scrutton L.J. had said) on behalf of and as the agents of the charterers, and so could claim the same protection as their principals, he prefaced this by the words "It "may be that the owners" (i.e., the *Grelwen's* owners) "were "not directly parties to the contract," which suggest that in his view the *Grelwen's* owners by taking possession of the goods on the charterer's behalf became indirectly parties to the contract and therefore entitled to the benefit of the exceptions contained in it.

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[32] [1924] A.C. 522, 564.

Lord Finlay founded himself on the view that the shippers put the goods on board the *Grelwen* to be carried on the terms of the bills of lading; that the act complained of was done in the course of stowage under the bills of lading which provided against liability for bad stowage; and that there was no independent tort unconnected with the performance of the contract. Finally, Lord Sumner based his conclusion either upon the ground that the reception of the cargo amounted to a bailment on terms which included the exceptions stipulated in the bill of lading, or upon the ground that the captain of the *Grelwen* took posssession of the cargo only as agent for the charterers, expressing a preference for the former view. To my mind these passages from their Lordships' speeches fall far short of establishing the general proposition contended for by the defendants in the present case.

It is, to my mind, clear that the words "the company will "not be responsible" in the conditions of the plaintiff's ticket cannot be extended so as to include the defendants in the way in which Lord Cave thought the somewhat ambiguous expression "the shipowners" in the bills of lading should be construed as including the *Grelwen's* owners as persons interested in the ship. Again, it is, to my mind, clear that the defendants cannot be said to have become parties to a contract with the plaintiff in the terms of the plaintiff's ticket upon the plaintiff going on board the *Himalaya* as a passenger. Moreover, in the *Elder Dempster* case it was not sought to make the *Grelwen's* owners liable for any tortious act committed by them personally, but to make them vicariously liable for the negligence of the master and crew on the principle of respondeat superior. It is by no means to be assumed that the result would have been the same if one of the *Grelwen's* crew had been sued for a tortious act committed by him personally in the course of the stowage of the goods.

In the present case the plaintiff, just as the plaintiff in *Cosgrove* v. *Horsfall*[33] had only to prove that he was lawfully on the omnibus, can maintain her action merely by showing that she was a lawful user of the gangway whom the defendants knew or ought to have known to be likely to use it; and this being so,

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[33] 62 T.L.R. 140.

I think the negligence of which she complains has a sufficient independence from the contract to fall within Lord Finlay's reservation with respect to the case of an independent tort.

In sum, the facts in the *Elder Dempster* case [34] were entirely different from those in the present case, not least in the respects that it was a case of the carriage of goods in a chartered vessel, whereas this is a case of the carriage of a passenger in a vessel belonging to the carriers; and that it was a case where it was sought to make the owners of a chartered vessel vicariously responsible for the tortious acts of the master and crew of that vessel when acting under the orders of the charterers, whereas this is a case where there is a direct claim in tort against the master and boatswain of a ship by a passenger travelling in the ship. The *Elder Dempster* case can well be explained by reference to its own facts without ascribing to their Lordships any intention to lay down any such general principle as the defendants here contend for, nor do I think that their Lordships' language, carefully directed as it was to the particular facts of the case then before the House, can fairly be construed as doing so.

It is interesting to note that in *Mersey Shipping and Transport Co. Ld.* v. *Rea Ld.*[35] Bankes and Scrutton L.JJ., sitting in a Divisional Court as additional judges of the King's Bench Division, expressed divergent views as to the effect of the *Elder Dempster* case.[36] Bankes L.J. said [37]: "But the court "there held that under the circumstances of the vessel being "chartered to form one of the owners' regular line, the proper "inference to draw was that the goods were shipped under con-"ditions which would cover both charterer and shipowner." Scrutton L.J. said [38]: "I think that the reasoning of the House "of Lords in the *Elder Dempster* case shows that, where there "is a contract which contains an exemption clause, the servants "or agents who act under that contract have the benefit of the "exemption clause. They cannot be sued in tort as independent "people, but they can claim the protection of the contract made "with their employers on whose behalf they are acting. I think "that is the result of the second point in the judgments of Lord "Cave and of Lord Sumner, with whom Lord Dunedin concurs, "in the *Elder Dempster* case."

I prefer the view of Bankes L.J. to that of Scrutton L.J. which, if accepted, would go far to make good the defendants' contention here. I should add that Scrutton L.J. seems to have misapprehended Lord Sumner's second point which, as I understand it, was that the captain of the *Grelwen* should be regarded as acting as agent for the charterers and not as agent for the *Grelwen's* owners, whom it was sought to make liable for the captain's default.

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[34] [1924] A.C. 522.
[35] (1925) 21 Ll.L.R. 375
[36] [1924] A.C. 522.
[37] 21 Ll.L.R. 375, 377.
[38] Ibid. 378.

For the reasons I have endeavoured to state I cannot accept the view that *Cosgrove* v. *Horsfall*[39] is inconsistent with the *Elder Dempster* case,[40] and I am accordingly of opinion that we must follow *Cosgrove* v. *Horsfall* as a decision of this court directly in point. Many other cases of varying degrees of relevance were cited to us and to the judge. I do not find it necessary to refer to these, for there is nothing in any of them which can be held to destroy the authority of *Cosgrove* v. *Horsfall*, once that case is absolved of inconsistency with the *Elder Dempster* case. Accordingly, I would dismiss the appeal.

MORRIS L.J. If the plaintiff has suffered injury and damage by reason of the personal negligence or breach of duty of the defendants, or one of them, it is said that the defendants are absolved from liability because the plaintiff contracted with their employers, the Peninsular and Oriental Steam Navigation Co., that the company would in such contingency not be responsible. The plaintiff did not, however, make a contract with the company that the servants of the company would not be responsible to the plaintiff. Even had there been such a contract, then, unless the company contracted as agents for their servants, the latter could not claim immunity for their personal torts if the decision of this court in *Cosgrove* v. *Horsfall*[41] is of binding validity.

The point of law which has been set down for hearing is whether the terms of the ticket held by the plaintiff afford a defence to the defendants against the claim of the plaintiff. On the ticket issued to the plaintiff it was stated: "Your attention is specially directed to the conditions of transportation on "the covers containing this ticket." It was also stated that: "Passengers and their baggage are carried at passengers' entire "risk." This must, I think, have reference to and be deemed to be a summary of "the conditions of transportation" to which attention is specially directed. It is to such "conditions" that reference must be made in order to ascertain the terms on which a passenger is carried.

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[39] 62 T.L.R. 140.

[40] [1924] A.C. 522.

[41] 62 T.L.R. 140.

The condition which is relied upon by the defendants begins with the words: "The company will not be responsible for and "shall be exempt from all liability in respect of." There is nothing which states that individual tortfeasors are to be free and exempt from liability. The immunity of the company is secured by phraseology which is designed to cover every contingency. There is no parsimony in the use of words and the first sentence contains over three hundred of them. It would have been easy to include a few extra words in an attempt to give immunity to the servants or agents of the company: the absence of such words rather suggests that the scope and design of the condition have reference to securing the immunity of the company.

From the multiform provisions of the protective condition it can be gleaned that: "The company will not be responsible for "and shall be exempt from all liability in respect of any . . . "loss damage or injury whatsoever of or to the person of any "passenger . . . and whether such . . . injury . . . shall occur "on land, on ship board or elsewhere . . . and whether the same "shall arise from . . . or by accidents . . . or any acts defaults "or negligence of . . . passengers . . . of any kind under any "circumstances whatsoever." If one passenger caused injury to another by a tortious act it could hardly be said that the words I have quoted give immunity to the former. There are, of course, in addition many words making the company immune from the consequences of any negligence of the company's servants or agents, and it is said that for any tort of a servant or agent for which the company would, apart from the condition, be answerable in law, a like measure of immunity may be asserted by the servant or agent as that which by contract has been conceded to the company.

The contention is advanced in various ways. It is said that "in contracting with the plaintiff upon the terms of the said "ticket the company acted in all material respects as the agent "of its servants and agents (including the defendants) and thereby exempted the defendants from any liability" such as is referred to in the statement of claim. The said agency is said to arise by implication of law. But I can see nothing to suggest that the company acted as the agent of its servants. The company did not purport to contract on their behalf and there is nothing which as a matter of law suggests that the plaintiff made a contract with each and every servant of the company or with those who were likely to sail on the ship on the projected voyage, or indeed with any person who might later become a servant and join the ship, or with any servant or agent whose conduct might in any way affect the plaintiff.

Alternatively it is urged that the plaintiff "agreed to travel "in all respects at her own risk," and impliedly agreed with the company's servants and agents that they should be under no liability to the plaintiff in connexion with any injury sustained by her as a passenger. But the agreement made by the plaintiff was on the terms of the express conditions and it is to them that reference must be made. I can see nothing in them which makes any implication necessary, and nothing to suggest that at some time or at various times and in some manner there came into existence a number of contracts between the plaintiff and various servants or agents of the company who, either on the ship or elsewhere, might by their conduct in any way affect the plaintiff. This contention appears to me to be both vague and unreal.

The argument mainly pressed on behalf of the defendants is that in reference to any acts or omissions occurring while servants or agents of the company are acting as such servants or agents reliance may be placed upon the terms of the ticket and that the servants or agents are "entitled to the same protection "as that afforded to the company by the terms of" the ticket.

There are clearly many circumstances which may be imagined in which it would be fair and reasonable that the servants or agents of the company should be as immune as the company. Equally there are many circumstances in which such a result would be unfair and unreasonable. Servants might claim civil protection against the consequences of wanton or wicked or criminal acts. But the issue must be resolved not by balancing considerations of convenience but by the application of principle. If a servant of the company seeks to protect himself from the consequences of a wrongful act he must show that he has made, or can claim to be a party to, a contract not objectionable on any grounds of public policy by which he is given immunity. In the present case the defendants can point to no such contract.

It is submitted that the binding effect of *Cosgrove* v. *Horsfall*[42] can be challenged because no consideration was given to the decision of the House of Lords in *Elder Dempster & Co.* v. *Paterson, Zochonis & Co.*[43] That was a somewhat special case, and in my judgment the reasoning in the speeches in the House of Lords did not direct any different conclusion from that which was reached in *Cosgrove* v. *Horsfall*.[42] The House of Lords case has been much mentioned in judicial utterances, but it is from the authority of the pronouncements in the House of Lords that throughout guidance must be obtained. Lord Sumner was definitely of opinion in that case that there was no bald bailment of the goods to the Griffiths Lewis Steam Navigation Co., with unrestricted liability. The view of the matter which he preferred was that the obligations to be inferred from the reception by the Griffiths Lewis company of cargo for carriage to the United Kingdom amounted to a bailment upon terms which included " the exceptions and limitations of liability stipulated " in the known and contemplated form of bill of lading." Lord Dunedin found that the opinion of Lord Sumner expressed fully and conclusively the result at which he himself had arrived. Lord Carson also agreed with Lord Sumner, and the fact that he also agreed with Lord Cave showed that he did not consider that there was serious divergence between the reasoning of Lord Cave and Lord Sumner. Lord Cave pointed out that it was stipulated in the bills of lading that " the shipowners " should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading and he considered that " this was intended to be a stipulation on behalf of all the " persons interested in the ship, that is to say, charterers and " owners alike." Lord Cave added : " It may be that the owners " were not directly parties to the contract; but they took posses- " sion of the goods (as Scrutton L.J. says) on behalf of and as " agents of the charterers and so can claim the same protection " as their principals." It seems to me that if when Paterson, Zochonis & Co. handed over the goods to the owners (Griffiths Lewis Steam Navigation Co.) the latter had said to Paterson Zochonis & Co. : " Whether we are deemed to be taking possession " of these goods on behalf of and as the agents of the charterers " or on some other footing, we take it that both you and we " intend that the stipulations in the bills of lading are to protect " us as well as the charterers," the answer would unquestionably have been : " Of course." In the circumstances existing at the time when the goods were placed on board there was occasion for an implied contract between those who delivered and those who received. I do not read the decision in the *Elder Dempster* case[44] as laying it down that if A makes a contract with B by which he agrees not to hold B answerable for the tort of his servant C, that C is thereby automatically given immunity if he commits a tort against A.

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[42] 62 T.L.R. 140.

[43] [1924] A.C. 522.

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[42] 62 T.L.R. 140.

[44] [1924] A.C. 522.

Many situations may arise in which a term in a contract between A and B can come into play so as to affect C. I do not seek to enumerate these situations but merely to illustrate some of them. Thus, there may be a separate contract between A and C which impliedly incorporates the term in the contract between A and B. Also there may arise dealings between A and C which are in some way related to or connected with the contract between A and B so that the term existing in that contract forms one of the circumstances to be taken into account when defining the duty owed by C to A. These are apart from cases where C might be the unnamed principal of B. Further, there may be cases in which A has expressly or impliedly authorized B to make on A's behalf a new contract with C which contains a term similar to that in the contract between A and B. The case of *Hall* v. *North Eastern Railway Co.*[45] may be regarded as an illustration of this. The plaintiff made a contract with the North British Co. by which, as a drover accompanying sheep that were to be carried, he was entitled to be carried at his own risk from Angerton to Newcastle N.E. The North British Co. did not operate beyond Morpeth; at Morpeth the plaintiff's carriage was attached to a train of the North Eastern Railway Co. and after the train left Morpeth it was run into by another train of the North Eastern Co. whose servants were negligent. Blackburn J. on those facts said[46]: "When the plaintiff went to the North British Co. and "took a ticket, under which he was to be carried from Angerton "to Newcastle, he, in effect, agreed that the North British Co. "should secure that the North Eastern Co. should carry him on "from Morpeth to Newcastle; and when he engaged to travel at "his own risk, he engaged with the North British Co. that "they should agree with the North Eastern Co. that he should "be carried on to Newcastle exactly on the same terms as if the "North British line extended to Newcastle. It is clear that this "is the true construction of the ticket: 'In consideration of my "'being carried the whole way free of charge I agree that I shall "'be travelling the whole way at my own risk'; and it seems "to me that the plaintiff did authorize the North British Co. "to contract for him with the North Eastern Co., and what he "authorized was that he should travel at his own risk."

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[45] L.R. 10 Q.B. 437.

[46] Ibid. 441.

Many variations of facts may be imagined in which the question arises whether a party is affected by a term in a contract. A recent illustration may be found in *Pyrene Co. Ld.* v. *Scindia Navigation Co. Ld.*,[47] where Devlin J. said[48]: "I think the "inference irresistible that it was the intention of all three parties "that the seller should participate in the contract of affreightment "so far as it affected him."

In cases where goods are handed over from one person to another then, unless some express contract defines the position, there is often the necessity upon a consideration of all the facts and circumstances to imply the basis or the terms which have effect. Each case must depend upon its own facts. But whether in relation to goods or generally in all situations immunity from the consequences of some action which would normally in the circumstances give rise to liability at the suit of another must, unless given by law, be secured by contract. Such contract may be express and it may become effective by the operation of the principles of agency: or it may be implied in particular circumstances: but a contract to which the party seeking immunity is a complete stranger will not avail.

For the reasons which I have indicated I do not consider that in the present case the shipping company was contracting as the agent of those whom it might employ, and I see no reason to suppose that the plaintiff intended to give immunity in wider terms or to a greater extent than is provided for in the words set out on her ticket. In my judgment, the terms of the ticket held by the plaintiff do not afford a defence to the defendants, and I would decide the preliminary point of law accordingly.

Appeal dismissed.

Solicitors: *Ince, Roscoe, Wilson & Griggs; Neil Maclean & Co.*

A. W. G.

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[47] [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[48] [1954] 2 W.L.R. 1005, 1019.

1954
Oct. 18, 19,
28.

McNair J.

BUTE (MARQUESS) *v.* BARCLAYS BANK LD.

Banking—Cheque—Crossed—Crossed warrant—"Pay A (for B)"—Credit of A's personal account by bank—Whether B entitled to sue in conversion—"True owner"—Estoppel by representation—Standard of care—Necessity for inquiries—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

In August, 1948, one McGaw was appointed manager of three farms in Scotland belonging to the plaintiff. His duties included the making of applications to the Department of Agriculture for Scotland for hill sheep subsidies in respect of the farms, and in January, 1949, he forwarded three such applications. On May 9, 1949, McGaw left the plaintiff's employment. No fresh instructions were sent by the plaintiff to the Department of Agriculture, and in September, 1949, the Department, in accordance with their usual practice, sent to McGaw, in satisfaction of the applications, three warrants crossed "Not negotiable," and stating: "If this "form, duly receipted, is presented through a bank within one "month, the King's and Lord Treasurer's Remembrancer will pay "Mr. D. McGaw, Kerrylamont, Rothesay, Bute" (the name and address being in a printed rectangle) "£133 10s." (in one case) "in "respect of Hill Sheep Subsidy, 1949." Immediately opposite the name "Mr. D. McGaw" but outside the box were the words "(for "the Marquess of Bute)." At the foot of the form was a note: "The receipt must be signed with exactly the same name as is "shown in the address. . . ."

On September 29, McGaw applied to a bank in Yorkshire for permission to open a personal account with the warrants, and the bank, although he was unknown to them, credited the amount of the warrants to an account in his name and forwarded them for collection. The proceeds were in due course credited to the bank, and, having taken up references, the bank permitted McGaw to draw on the account. In an action in conversion against the bank by the plaintiff for the amount payable under the warrants:—

Held, (1) that in order to claim in conversion it was not necessary for the plaintiff to establish that he was the true owner of the property alleged to have been converted, but that it was sufficient if he could prove that at the time of the conversion he was entitled to immediate possession; and that, since McGaw's only title to receive the warrants stemmed from his employment as manager, the plaintiff was, after the termination of that employment, entitled to require McGaw to deliver them to him when received and was, therefore, at the date of the conversion, entitled to immediate possession and, accordingly, entitled to sue in conversion;

(2) that as a matter of construction the warrants bore a clear indication that McGaw was to receive the money as agent or in a fiduciary capacity, and there was no justification for reading them as containing a representation that payment could safely be made

to McGaw without any inquiry, for it was elementary banking practice that such documents should not be credited to a personal account of the named payee without inquiry; and that the plaintiff, therefore, was not estopped by representation from denying that McGaw was entitled to receive the proceeds personally;

(3) that the bank had not discharged the onus of proving that they had acted without negligence, and, therefore, they could not claim the protection of section 82 of the Bills of Exchange Act, 1882.

The plaintiff, accordingly, was entitled to recover the amount payable under the warrants.

Per curiam. The plaintiff was the true owner, for the warrants on their face purported to be payments in respect of hill sheep subsidy which, to the knowledge of the drawers, was due to him and not to McGaw; there was no valid distinction between "Pay A "for account of B" and "Pay A for B."

ACTION.

The plaintiff, the Marquess of Bute, owned three sheep farms in the Island of Bute, in respect of which he was entitled, under the Hill Farming Act, 1946, to claim a hill sheep subsidy, payable by the Department of Agriculture for Scotland. In August, 1948, one McGaw was appointed the manager of the three farms and part of the terms of his employment was that all sums received by him in respect of the farms should be brought by him to the estate office for payment by the factor into the plaintiff's home farm account at the Royal Bank of Scotland and later the Clydesdale Bank, both at Rothesay. This account could only be drawn on by the plaintiff himself, the factor or the acting factor.

McGaw's duties also included the making of applications to the Department of Agriculture for the hill sheep subsidies, and at the end of January, 1949, in pursuance of that duty, he completed and forwarded three applications for subsidy payments in respect of sheep maintained on the farms on December 4, 1948. Though in the body of the application form, under the heading "Name of Applicant," the name of the Marquess of Bute was inserted, in the section in which the formal application was made the signature of the applicant was that of McGaw. On April 1, 1949, McGaw tendered his resignation of the post as manager and left the service of the plaintiff, but between August 31 and September 27, 1949, the Department of Agriculture forwarded three warrants, in satisfaction of the three applications, to McGaw, addressed, in accordance with the request contained in the application forms, to him at the farm in Rothesay, Bute, at which he had resided while in the plaintiff's service. These warrants were readdressed by the local post office to him at another address and so came into his possession. The warrants, which were substantially in the form of the usual payable orders commonly used by Government Departments, were headed "Department of Agriculture for Scotland (Food Production "Services) Vote," and provided as follows: "If this form, duly "receipted, is presented through a bank within one month, the "King's and Lord Treasurer's Remembrancer will pay: Mr. D. "McGaw, Kerrylamont, Rothesay, Bute," that name and address being contained in a printed rectangle or box, "£133 10s." (in the case of one of the warrants) "in respect of hill sheep subsidy, "1949," and were signed by the secretary. Immediately opposite the name Mr. D. McGaw, but outside the box, there appeared the words in brackets "for Marquess of Bute." At the foot of the form there appeared the following note: "The receipt "must be signed with exactly the same name as is shown in the "address. In the case of a joint stock company or corporation "the person signing must state the capacity in which he acts." The warrants bore in print the crossing "Not negotiable . . . "& Co."

On September 27, 1949, McGaw, who was then living at Cannon Hall Farm, Barnsley, applied to one of the three cashiers of the Barnsley branch of the defendants, Barclays Bank Ld., for permission to open, with the three warrants, a personal account of his own at that branch. Up to that date he was unknown to the bank, and he was asked by the cashier for references, and was told that the account could not be operated until the references had been taken up. Nevertheless on the same day, before the references were taken up, he, in the presence and with the assistance of the cashier, signed the receipts on the forms, entered their amounts on a paying-in slip, and handed the warrants over to the cashier. The total amount of the three warrants (namely, £546) was the same day credited to an account in McGaw's name with the bank, and the warrants themselves, after being specially crossed by a rubber stamp bearing the name of the bank, were forwarded for collection to the Exchequer, Edinburgh. Their proceeds were in due course, on or about September 30, credited to the defendant bank. On October 12 the bank, having received satisfactory replies from two of the references provided by McGaw, but not having communicated in any way with the plaintiff, issued a cheque book to McGaw and permitted him to draw on the account.

In fact the plaintiff's factor and assistant factor knew that in practice the warrants for the hill sheep subsidy were sent direct to the farm manager and were drawn in favour of the manager with the addition of the words "for the Marquess of Bute," but after McGaw had left the plaintiff's service no direction was sent from the estate office to the Department of Agriculture requiring any alteration in the form of the warrants.

The plaintiff contended that the warrants and/or proceeds were at all times his property; alternatively, that the warrants bore on their face a clear indication that McGaw was not beneficially entitled to the proceeds; and he claimed the sum of £546, the total sum payable under the three warrants, damages for conversion, or, alternatively, the same sum as moneys had and received by the bank to his use, and interest.

The bank denied that the warrants or their proceeds were the property of the plaintiff, or that they bore any indication that McGaw was not entitled to receive the proceeds. Alternatively, they contended that by virtue of section 17 of the Revenue Act, 1883,[1] the warrants were deemed to be crossed cheques to which section 82 of the Bills of Exchange Act, 1882,[1] applied, and that, as they had in good faith and without negligence received payment for their customer, McGaw, they were not liable. They further contended that the plaintiff was estopped from denying that the moneys payable under the warrants were intended by him to be received by McGaw, and that McGaw was entitled to deliver them to any bank with which he had an account for the purpose of collecting the proceeds and crediting them to his account.

J. Milnes Holden and *J. E. Artro-Morris* for the plaintiff. The true owner of a cheque is the person entitled to the property in and possession of the instrument (*Midland Bank Ld.* v.

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[1] Bills of Exchange Act, 1882, s. 82: "Where a banker in good faith "and without negligence receives payment for a customer of a cheque "crossed generally or specially to "himself, and the customer has no "title or a defective title thereto, the "banker shall not incur any liability "to the true owner of the cheque by "reason only of having received such "payment."

Revenue Act, 1883, s. 17: "Sections 76 to 82 . . . of the Bills of "Exchange Act, 1882, . . . shall "extend to any document issued by "a customer of any banker, and "intended to enable any person . . . "to obtain payment from such banker ". . . as if the said document were a "cheque. . . . the Queen's and Lord "Treasurer's Remembrancer in Scotland shall be deemed to be bankers, "and the public officers drawing on "them shall be deemed customers."

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BUTE (MARQUESS) *v.* BARCLAYS BANK LD.

Reckitt [2]), not necessarily the person to whom it is made payable: *Great Western Railway Co.* v. *London and County Banking Co. Ld.*,[3] *Morison* v. *London County and Westminster Bank Ld.*,[4] in particular the remarks of Lord Reading[5] and Buckley L.J.,[6] and *Lloyds Bank Ld.* v. *Chartered Bank of India, Australia and China.*[7] The plaintiff was entitled to the property in and possession of the warrants, for whatever rights McGaw had, such as possible rights of custody, he had on behalf of the plaintiff, his principal, in whom the legal possession vested. No matter how the instruments are made out, the test is that laid down by Lord Atkin in *Midland Bank Ld.* v. *Reckitt*,[8] and a principal who is entitled to money and finds that his agent is about to pay it into his own account can say "That is my property, hand it over "at once." That applies equally to a cheque. If something is sold by a fraudulent agent, the buyer does not get a good title. The same applies here, and the plaintiff is entitled to sue in conversion.

[McNAIR J. What is the act of conversion on which you rely?]

The collection of the warrants and their presentation to the King's Remembrancer. [Reference was also made to *A. L. Underwood Ld.* v. *Bank of Liverpool and Martins.*[9]]

Maurice Lyell Q.C. and *B. J. Brooke-Smith* for the defendant bank. McGaw, not the plaintiff, was the true owner of the warrants. A cheque is a chose in action conferring a right to payment in accordance with its terms; it is evidence of a contract and the contractual part governs the passing of property: see Paget's Law of Banking (1947), 5th ed., pp. 230, 231, and the legal title was in the payee. These warrants were sent out in a form indicating that it was intended to confer the right to receive payment on a named person, McGaw, and therefore he was entitled to present them to the bank, and the bank, as a matter of contract, was entitled to pay the amounts to him. On the true construction of the warrants the payee is McGaw. "Pay A "for B" does not mean "Pay B"; even if the payment is in a fiduciary capacity, it is still A who must be paid. The case is the opposite of *Slingsby* v. *District Bank*,[10] where the words were "Pay B through A." The distinction is a real one, because it is a distinction between an intention to pay someone, leaving him to account, and intention that another person shall receive the money. The decisive factor is the intention of the drawer as it appears on the face of the documents; here the intention of the drawer appearing on the face of the warrants was that McGaw should receive the payment. The cases cited on behalf of the plaintiff are distinguishable because there was here no fraud on the drawer. The bank was entitled to treat the warrants as meaning what they said and to treat McGaw as having a good title. The plaintiff's only rights in relation to the warrants arise, not by virtue of a title to them, but under the contract between him and his agent, McGaw; he had, therefore, no title at all and cannot sue in conversion.

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[2] [1933] A.C. 1; 48 T.L.R. 271.

[3] [1901] A.C. 414; 17 T.L.R. 700.

[4] [1914] 3 K.B. 356; 30 T.L.R. 481.

[5] [1914] 3 K.B. 356, 364.

[6] Ibid. 375.

[7] [1929] 1 K.B. 40; 44 T.L.R. 534.

[8] [1933] A.C. 1, 14.

[9] [1924] 1 K.B. 775; 40 T.L.R. 302.

[McNAIR J. May not a plaintiff sue in conversion if he had at the material time an immediate right to possession, so that, if the plaintiff had a right, after the termination of McGaw's employment, to call on him to hand over the warrants, he had sufficient title to sue in conversion? Or may it not be sufficient if the plaintiff can establish that he could, had the facts been known to him, have successfully applied for an injunction restraining McGaw from dealing with the warrants?]

The plaintiff authorized the Department of Agriculture to draw up the warrants in that form, and he set up a state of affairs under which the Department conferred a title on McGaw. The authority to the Department was not revoked and the plaintiff left the title in the warrants in accordance with their tenor. Even if he could have obtained an injunction restraining McGaw from dealing with the warrants, that would not mean that the title was not in McGaw; it would merely prevent McGaw from using the title which he had. A proprietary right in a cheque is no more than a right to present it. A collecting as agent does not negative the right to collect, and an agent who is entitled to receive money is not disentitled to receive it because he has determined to convert it.

[McNAIR J. He is not entitled to receive it absolutely but for the credit of his principal.]

A bank should not be in any worse position because an agent has conceived a fraudulent intent.

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[10] [1932] 1 K.B. 544; 48 T.L.R. 114.

The plaintiff is estopped from denying that the moneys were intended by him to be received by McGaw. The warrants contained a representation that McGaw was entitled to present them, but would be accountable to the plaintiff for the proceeds. The arrangement whereby McGaw was not entitled to present them was a private arrangement negativing the effect of the warrants; no sign of that arrangement appeared on the face of the warrants and it cannot control them contractually. The plaintiff deliberately decided to trust McGaw, and what appeared from the warrants was that he had desired his debtors to discharge their debt by putting money into the hands of another. A bank faced with a document of that kind is entitled to assume that it means what it says—that the Department of Agriculture intended McGaw to collect money for which he was to be accountable to the plaintiff—and they are further entitled to assume, having regard to the character of the drawer, that the warrants would not have been drawn in that form without authority. In *Great Western Railway Co.* v. *London and County Banking Co. Ld.*[11] the bank were put on inquiry by quite different circumstances; there is no case in which it has been held that a bank was wrong in paying on a cheque drawn in favour of the person presenting it, except where that person had, or was known to the bank to have had, a hand in drawing it. [Reference was also made to *Lloyds Bank Ld.* v. *Chartered Bank of India, Australia and China.*[12]]

If a non-negotiable instrument, which on its face states that a certain person is entitled to present it, is put into the hands of that person, that amounts to a representation to the bank: see *Goodwin* v. *Robarts*,[13] in particular the remarks of Lord Cairns L.C.[14] That applies equally to these warrants, and the plaintiff, who knew that they would be made out bearing on their face a clear indication that payment might be made to McGaw, and that they would come into McGaw's possession in that form, represented, through the Department of Agriculture, that McGaw was entitled to receive the money. The plaintiff, therefore, cannot now say that the bank should have been put upon inquiry, for it is not obligatory upon a person to whom such a representation is made to make investigations as to its truth: see *Bloomenthal* v. *Ford*,[15] in particular the remarks of Lord Herschell.[16] Want of care does not disentitle a person who believed a representation to rely on estoppel.

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[11] [1901] A.C. 414.

[12] [1929] 1 K.B. 40.

[13] (1876) 1 App.Cas. 476.

[14] Ibid. 489, 490.

[15] [1897] A.C. 156; 13 T.L.R. 240.

[16] [1897] A.C. 156, 168.

[McNAIR J. Your proposition must be that an honest belief in a representation is sufficient.]

If the document was, as here, lawfully in the hands of the presentor and the statement was such as reasonably to induce the belief: *Freeman* v. *Cooke*.[17] Negligence is not a failure to query the truth of a statement, but a failure to observe some other matter which negatives its truth. The test is what a reasonable man would have thought; in this case a reasonable man would have treated the words "for the Marquess of Bute" as a note or memorandum to McGaw, and as a direction to him to account for the proceeds. The position must be looked at from a business point of view, and in business people are assumed to be honest until the contrary is proved. The bank's action was in accordance with the ordinary practice of banking, and they have discharged their onus under section 82 of the Bills of Exchange Act, 1882, of disproving negligence.

J. Milnes Holden in reply. Although distinguishable on their facts, the principle arising from the four cases cited in opening applies here. The plaintiff was the true owner of the warrants, but it is not necessary to put it as high as that, for had the plaintiff found McGaw standing at the counter waiting to pay the warrants in he could have demanded them from him: see Lord Atkin's observations in *Midland Bank Ld.* v. *Reckitt*.[18] There is no distinction between the title to a cheque itself and the title to the money represented by it: *Great Western Railway Co.* v. *London and County Banking Co.*[19] and *Morison* v. *London County and Westminster Bank Ld.*[20] The expression "true "owner" cannot be equated with payee. Conceding that the decisive factor is the intention of the drawer, it is quite clear that the Department intended to pay the plaintiff and not McGaw.

The words "for the Marquess of Bute" were a warning to bankers. In *Lloyds Bank Ld.* v. *E. B. Savory & Co.*[21] Lord Warrington [22] said that the standard of care was to be ascertained by the ordinary practice of reasonable men, but Lord Wright [23] considered that that was not always sufficient. See also the test laid down by Sankey L.J. in *Lloyds Bank Ld.* v. *Chartered Bank*

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[17] (1848) 2 Exch. 654.

[18] [1933] A.C. 1, 14.

[19] [1901] A.C. 414.

[20] [1914] 3 K.B. 356.

[21] [1933] A.C. 201.

[22] Ibid. 221.

[23] Ibid. 232.

of India, Australia and China.[24] Even if the test is that of the ordinary practice of banking, the bank have failed to discharge their onus of proving that they acted without negligence, for they should have been put on inquiry by the clear reference in the warrants to the interest of a third party. [Reference was made to *A. L. Underwood Ld.* v. *Bank of Liverpool and Martins.*[25]]

There was in fact no representation by the plaintiff which could form the basis of estoppel; no appearance of authority was ever displayed to the defendants by the plaintiff, and at the time when the bank collected the warrants they had no knowledge of the dealings between the plaintiff and the Department of Agriculture under which the warrants were drawn in that form. If there was any representation it was no more than that McGaw was the plaintiff's agent, and a fiduciary relationship was shown which, in the circumstances, should have put the bank upon their guard. If the bank was put upon inquiry, that in itself defeats any reliance by them on ostensible authority. On the inter-relation between estoppel and negligence under section 82 of the Bills of Exchange Act, 1882, see *A. L. Underwood Ld.* v. *Bank of Liverpool and Martins,*[26] *Fine Art Society Ld.* v. *Union Bank of London Ld.*[27] and *Bevan* v. *National Bank Ld.*[28]

Cur. adv. vult.

October 28. McNAIR J. stated the facts as set out above and continued: In these circumstances, the plaintiff seeks to recover a sum equal to the total amount of the warrants as damages for conversion or, alternatively, the like sum as moneys had and received by the defendants to the use of the plaintiff.

In substance, three grounds of defence were taken by the bank. First, it was said that McGaw and not the plaintiff was at all material times the true owner of the warrants and their proceeds, though accountable to the plaintiff, and that, accordingly, the plaintiff is not entitled to sue either in conversion or for money had and received.

Secondly, it was said that the plaintiff, with the knowledge that any sums payable in respect of hill sheep subsidy would be paid by means of warrants payable to McGaw, represented to any banker receiving the warrants that McGaw was entitled to receive and hold the warrants and their proceeds for his personal account, and, accordingly, is estopped as against the defendant bank from denying that McGaw was so entitled.

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[24] [1929] 1 K.B. 40, 69.

[25] [1924] 1 K.B. 775.

[26] [1924] 1 K.B. 775.

[27] (1886) 17 Q.B.D. 705; 2 T.L.R. 883.

[28] (1906) 23 T.L.R. 65.

Thirdly, the defendants alleged that they received payment of the warrants in good faith and without negligence, and accordingly were entitled to the protection of section 82 of the Bills of Exchange Act, 1882, as applied to these warrants by section 17 of the Revenue Act, 1883.

As to the first ground, the short answer, in my judgment, is that, in order to claim in conversion, it is not necessary for the plaintiff to establish that he is the true owner of the property alleged to have been converted. It is sufficient if he can prove that at the time of the alleged conversion he was entitled to immediate possession. Inasmuch as McGaw's employment was terminated not later than May 9, 1949, and thereafter the plaintiff would clearly have been entitled, had he been so minded, to require McGaw to deliver the warrants to him when received, since his only title to receive them stemmed from his appointment as manager, I think it is clear that at the date of the alleged conversion in September, 1949, the plaintiff was entitled to immediate possession and, accordingly, entitled to sue in conversion. I have no doubt that, if the plaintiff had known the true facts in September, 1949, before McGaw approached the bank, he could successfully have applied for an injunction to restrain McGaw from dealing with the warrants otherwise than by handing them over to him. Such injunction would properly have been granted on the ground that McGaw's right to receive and retain the warrants or their proceeds had lapsed when his employment ceased.

Out of deference, however, to the careful and helpful arguments that were addressed to me by counsel on either side, it is right that I should express my view on the question whether or not the plaintiff was at the material time the "true owner" of the warrants. The expression "true owner" is nowhere defined in the Bills of Exchange Act, 1882. It appears in section 79 (2), section 80 and section 82, and presumably has the same meaning in each case. On behalf of the plaintiff, reliance was placed on such cases as *Midland Bank Ld.* v. *Reckitt*,[1] and in particular on Lord Atkin's speech,[2] *Great Western Railway Co.* v. *London and County Banking Co. Ld.*,[3] *Morison* v. *London County and Westminster Bank Ld.*[4] and *Lloyds Bank Ld.* v.

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[1] [1933] A.C. 1; 48 T.L.R. 271.

[2] [1933] A.C. 1, 14.

[3] [1901] A.C. 414; 17 T.L.R. 700.

[4] [1914] 3 K.B. 356; 30 T.L.R. 481.

Chartered Bank of India, Australia and China,[5] as establishing that the innocent principal and not the fraudulent agent was the true owner in such circumstances. But in each of those cases there was fraud in the drawing or in obtaining the drawing of the cheque, and, in my judgment, they do not assist in the solution of the present case, in which the fraud consisted in the dealing with warrants properly drawn in accordance with the principal's instructions or at least with his knowledge, actual or imputed.

Mr. Lyell, as I consider, rightly submitted that the test in this case is to be found in the intention of the drawer as expressed in the document. Though it was argued that, as a matter of construction, the words "for Marquess of Bute" were merely inserted for the information of McGaw, I consider that these words, particularly having regard to their position on the warrants, form an essential part of the description of the drawee. On this view, the warrants contain a promise to pay A for B. Admittedly this formula is different from "Pay B through A," as to which see *Slingsby* v. *District Bank Ld.*[6] and in particular the judgment of Scrutton L.J.[7] But, having regard to the fact that the warrants on their face purported to be payments in respect of hill sheep subsidy, which, to the knowledge of the drawers, was due to the Marquess of Bute and not to McGaw, it seems to me to be plain that the intention of the Department, as evidenced by the warrants, must be taken to have been that the plaintiff should be the true owner of the warrants and their proceeds, and not that the true owner should be McGaw, leaving him merely accountable to the Marquess. Furthermore, I can see no valid distinction between "Pay A for account of B" and "Pay A for B," and I am fortified in my belief that the former phrase connotes that B is to be the true owner by the opinion of the late Sir John Paget K.C., given in an answer to question No. 326 in Questions on Banking Practice, 8th ed. (1930), p. 111 [issued by the Institute of Bankers]. Accordingly, quite apart from the fact that at the material time McGaw's authority had been terminated, I consider that at all times, including the date of the conversion, the plaintiff was the true owner and not McGaw.

I next turn to the question of estoppel. For the purpose of this point I accept (1) that McGaw was authorized to make application for hill sheep subsidy in the way he did, and (2) that the plaintiff, through his estate office, must be taken to have known that the warrants would be sent to McGaw in the form "Pay McGaw for the Marquess of Bute."

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[5] [1929] 1 K.B. 40; 44 T.L.R. 534.

[6] [1932] 1 K.B. 544; 48 T.L.R. 114.

[7] [1932] 1 K.B. 544, 557.

On this state of facts it was argued that an estoppel against the plaintiff was established by the application of the principles (1) that an estoppel by representation may arise from A putting into the possession of B, or allowing B to obtain possession of, a document which itself contains a representation that the payment may be made to B personally; and (2) that, if the document contains such a representation or is reasonably understood by the person to whom it is presented to contain such a representation, the person to whom it is presented can safely pay B and is under no obligation to make investigation or inquiry to ascertain whether this representation is true. Authority for both these principles is, in my judgment, to be found in *Goodwin* v. *Robarts*,[8] *Bloomenthal* v. *Ford*[9] and *Freeman* v. *Cooke*.[10] But the representation must be clear and unequivocal or at least reasonably understood to be clear and unequivocal. I have already stated my conclusion that, as a matter of construction, the warrants do not contain a representation that payments may be made to McGaw personally; but, for the purpose of the principles above stated, the crucial question on the facts of this case is whether they could reasonably be understood to contain such a representation. The cashier (the honesty of whose evidence I accept) stated that, though he had dealt with payable orders issued by Government Departments before, he had never dealt with warrants in this form, that he did not connect the reference to the Marquess with the payee's name at all, and that he regarded the words "for the Marquess of Bute" as no more than a note or memorandum for McGaw intended to indicate to him the source from which the money was coming.

In my judgment, there was no reasonable justification, either in the form of the documents or in the circumstances in which they were produced to the cashier, for such belief. It seems to me that no reasonable cashier in Barnsley to whom a complete stranger presented warrants in this form, which, on the face of them, bore a clear indication that they were payments in respect of hill sheep subsidy payable by the Department of Agriculture for Scotland and an address in Rothesay, Bute, could have read

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[8] (1876) 1 App.Cas. 476, 489.

[9] [1897] A.C. 156, 168; 13 T.L.R. 240.

[10] (1848) 2 Exch. 654.

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them as containing a representation that payment could safely be made to the personal account of McGaw without any inquiry. They bore the clear indication at the lowest that McGaw was to receive the money as agent or in a fiduciary capacity, and it is elementary banking practice that such documents should not be credited to a personal account of the named payee without inquiry. In my judgment, this plea of estoppel fails.

As to the third ground (that is, the plea based on section 82 of the Bills of Exchange Act, 1882), it seems to me that the conclusion stated above, if correct, is fatal to any defence under this section. The standard of care required of a banker in such a case is stated by Lord Warrington in *Lloyds Bank Ld.* v. *E. B. Savory & Co.*[11] as being judged "by reference to the practice "of reasonable men carrying on the business of bankers, and "endeavouring to do so in such a manner as may be calculated "to protect themselves and others against fraud." A somewhat lower test was stated by Sankey L.J. in *Lloyds Bank Ld.* v. *Chartered Bank of India, Australia and China.*[12] But whichever test is applied I consider that the defendants have not discharged the onus of proving that they acted without negligence.

Judgment for the plaintiff.

Solicitors: *Murray, Hutchins & Co.; Durrant Cooper & Hambling.*

J. F. L.

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[11] [1933] A.C. 201, 221; 49 T.L.R. 116.

[12] [1929] 1 K.B. 40, 69.

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REID *v.* DAWSON.

[1953 R. No. 414.]

Agriculture—Agricultural holding—Tenancy—Protection—Letting of fields for mowing and grazing during 364 *days in the year—Whether let "during some specified period of the year"—Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 2 (1), *proviso.*

By an agreement between the then owner of the land and the defendant the latter was granted the exclusive right to mow for hay and to depasture only sheep and cattle on three fields for a term of 364 days. At the end of that period the defendant held over for another 364 days and was then given notice to quit by the plaintiffs, who had become owners by purchase. The defendant claimed the protection of section 2 (1) of the Agricultural Holdings Act, 1948:—

Held, that the letting was made in contemplation of the use of the land for grazing and mowing during a "specified period of the "year," and therefore came within the proviso to section 2 (1); and that the plaintiffs were accordingly entitled to an order for possession.

Decision of Jones J. affirmed.

Appeal from Jones J.

By an agreement dated December 19, 1950, certain fields in Sussex were let by the then owner, Lady Craigie, to the defendant, Mrs. Ida V. Dawson, who agreed "to take and hire the "exclusive right and liberty to mow for hay and to depasture only "sheep and cattle over and upon the land . . . for a term com- "mencing on November 1, 1950, and terminating on October 30, "1951," at a rent of £150 a year payable by half-yearly instalments. The term of the lease was only for 364 days, the intention of the landlord being to keep the land out of the operation of section 2 (1) of the Agricultural Holdings Act, 1948,[1] and bring it within the proviso to that section.

At the end of the 364 days, although some correspondence took place, no specific arrangement was made, but the defendant retained the use of the fields, paying rent in half-yearly instalments. By the time the second period came to an end the plaintiffs, Mr. and Mrs. Reid, had purchased the fields from Lady Craigie, and they served notice to quit on the defendant, and by the present action claimed possession.

Jones J. held that the letting came within the proviso and he granted the plaintiffs possession. The defendant appealed.

[1] Agricultural Holdings Act, 1948, s. 2 (1): "Subject to the provisions "of this section, where under an "agreement . . . any land is let to "a person for use as agricultural land "for an interest less than a tenancy "from year to year, or a person is "granted a licence to occupy land for "use as agricultural land, and the "circumstances are such that if his "interest were a tenancy from year "to year he would in respect of that "land be the tenant of an agricul- "tural holding, then, unless the let- "ting or grant was approved by the "Minister before the agreement was "entered into, the agreement shall "take effect, with the necessary "modifications, as if it were an "agreement for the letting of land "for a tenancy from year to year. "Provided that this subsection shall "not have effect in relation to an "agreement for the letting of land, "or the granting of a licence to "occupy land, made (whether or not "the agreement expressly so provides) "in contemplation of the use of the "land only for grazing or mowing "during some specified period of the "year."

Cyril Harvey Q.C. and *L. A. Blundell* for the defendant. The judge has held that as the land was granted only for grazing and mowing and for only 364 days it was a letting for a specified period of the year and so came within the proviso. It is submitted that the letting for 364 days is a device to take the land out of section 2. It fails to do so. When the proviso speaks of a "specified period of the year" it means a period of the year which has some significance in agriculture, such as the hay-making season or the summer or winter grazing. So far as it is a question of fact for the court, the evidence is plain that from an agricultural point of view the words "364 days" have no significance. If the proviso takes this letting out of the Act it is difficult to think that the enacting part of the section could ever apply at all if the letting is for grazing and mowing. "Specified period of the "year" must mean a period of agricultural significance. It is not "a year" but "the year." The proviso is intended to cut down the methods by which it is sought to evade the protection given by the section, and it only applies when the letting is in contemplation of the use of the land for a defined seasonal purpose for a specified period.

P. Ingress Bell Q.C. and *Ian Warren* for the plaintiffs. If there is an agreement in writing and the parties express the purpose of the letting, the court should not look beyond the agreement: *Wolfe* v. *Hogan.*[2] That being so, then, subject to the question whether 364 days is a period of the year, the conditions laid down in the proviso are complied with as to the first period. The defendant had no express agreement with regard to the second period but, as the judge implied, exactly the same principle applied, for the terms of the first agreement would be imported into the second implied agreement. There is no substance in the contention that the "specified period of the "year" was intended to refer only to a seasonal period.

DENNING L.J. In 1946 Lady Craigie bought nearly 50 acres of land in Sussex which were near her own premises. They were at that time under requisition and she wanted in due course to go into occupation of them herself. An adjoining farmer, the defendant, who had a number of sheep and cattle, was anxious to have the use of those fields for grazing. She approached Sir Robert Craigie about it, and Sir Robert said that they hoped to get the land back from the requisitioning authorities and that she could have it for a year for grazing. In due course, at the urgent request of the defendant, Sir Robert managed to get the Agricultural Executive Committee to release the land. Then a question arose as to the terms on which the defendant should be allowed to use it. Advice was taken on the matter through local agents, and in consequence an agreement was drawn up, which both sides knew was intended to avoid the land being caught by the Agricultural Holdings Act, 1948. If it were just a simple letting of land for a year or even if it were a simple letting of grazing for one whole year, it would be caught by the Act and there would have to be a year's notice to quit before the owner could obtain control of it, and in these days he could not even give that notice without the consent of the Minister. To avoid being caught by such a position the parties, with full knowledge, entered into an agreement dated December 19, 1950, in which Lady Craigie agreed to let, and the defendant agreed "to take and hire the exclusive "right and liberty to mow for hay and to depasture only sheep "and cattle over and upon the land," which is then described, "for a term commencing on November 1, 1950, and terminating "on October 30, 1951," at a rent of £150 a year, payable by half-yearly instalments. It is important to notice that the letting was not for a whole year but only for 364 days. In pursuance of the agreement, the defendant put her sheep and cattle on the land for all the time.

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[2] [1949] 2 K.B. 194, 204; [1949] 1 All E.R. 570.

When it came towards the end of the 364 days, a question arose as to what was to happen after they came to an end and, although nothing specific was arranged, rent was paid for the first six months commencing on November 1, 1951, and then again for the second half-year. Those second payments, the judge has found, were made on the footing that the second period was granted on precisely the same terms as the first period. By the time the second period came to an end Lady Craigie had sold her interest to the plaintiffs, the present owners, who claim possession.

Therefore, we have here a case of two agreements for mowing and grazing on 50 acres of land for two periods of 364 days. The question is whether the agreements so made are caught by the Agricultural Holdings Act, 1948. Before I read the section I would like to refer to the history. Under the Act of 1923, if there was a yearly tenancy, or a tenancy for a term of years, the landlord could not get possession except on giving 12 months' notice. That section came up for consideration in 1944 in *Land*

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Settlement Association Ld. v. *Carr*,[1] where there was an agreement to let land for 364 days and thereafter for successive periods of 364 days. This court held that that was not a tenancy from year to year or for a term of years: it was not caught by the Act of 1923 and, therefore, there was no need for the 12 months' notice. When the Act of 1947 was passed, that decision was overcome. A section was inserted which now appears repeated in the Agricultural Holdings Act, 1948, s. 2 (1). [His Lordship read the subsection and continued:] That means that a tenancy for 364 days, like that in *Land Settlement Association Ld.* v. *Carr*,[1] operates as if it were a tenancy from year to year: so, also, under that section does a letting for any shorter period than a year or, indeed, under a licence to occupy. They all operate as a tenancy from year to year and are caught by the Act.

It is subject, however, to this proviso, and this is what we have to consider in this case: "Provided that this subsection shall not "have effect in relation to an agreement for the letting of land, "or the granting of a licence to occupy land, made (whether or "not the agreement expressly so provides) in contemplation of "the use of the land only for grazing or mowing during some "specified period of the year." The question in the present case is whether the agreement which I have cited comes within that proviso. This was certainly an agreement for the letting of land, or the granting of a licence to occupy land. It was certainly made in contemplation of the use of the land only for grazing or mowing. The whole question in the case is whether it was made in contemplation of the use of the land "during some specified "period of the year." The judge has held that, as it was granted for 364 days, it was granted for a specified period of the year, and has given judgment accordingly in favour of the owner.

The defendant appeals to this court, and the argument which is put before us is that the 364 days is a device to avoid the operation of the section and that it should not be permitted. It is said that when the statute spoke of a "specified period of "the year" it had in mind a period of the year which had some significance in agriculture, such as the hay-making season or the summer grazing or the winter grazing. The difficulty which I feel about that construction is that it is impossible to put it accurately into words, whereas the section itself is quite clear. In my judgment a period of 364 days is a specified period of the year just as much as 200, 250 or 350. I do not know where one is to stop short of 364 days. In my judgment the appeal should be dismissed.

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[1] [1944] K.B. 657; 60 T.L.R. 488; [1944] 2 All E.R. 126.

Morris L.J. I have reached the same conclusion. The issue which has been debated in this court is very much narrower than those which were originally raised in the action. It was, for example, pleaded in the defence that the real intention between Lady Craigie and the defendant was to enter into an agreement from year to year. It was further pleaded in the defence that the tenant became a tenant from year to year and that such a tenancy was implied from facts and circumstances which were pleaded. None of those matters now remain in issue in view of the clear findings of the judge. The judge recited that Sir Robert Craigie went to a firm of land agents to prepare a grazing agreement: they suggested to him that the proposed tenancy should not be for a year, but for a period less than a year, because of the provisions of section 2 of the Agricultural Holdings Act, 1948. It is quite clear that that was the origin of the form which the agreement took. It is equally clear that the defendant fully appreciated what was being done. The judge said in his judgment: " The defendant consulted another agent " and a solicitor (who were, I believe, the agent and solicitor of " the Farmers' Union) before or after attending this meeting and " she showed them the draft agreement, or the agreement in its " final form, before she signed it."

Then the judge summarized the effect of her evidence and said: " In her evidence she said that her view of the agreement " was as follows: ' I realized that in the first agreement Sir " ' Robert and Lady Craigie meant to retain control over the land " ' and that they only meant to give me a grazing tenancy for " ' less than a year, namely, 364 days. I knew that that was " ' their intention. I did not think I was getting more than a " ' non-ploughing agreement for less than a year.' " Furthermore, the judge referred to the evidence of a Mr. Clark, which he summarized as follows: " Mr. Clark said: ' I have acted for " ' the defendant. I witnessed her signature to the grazing " ' agreement. I think it was signed on November 1 but, any- " ' how, it was before November 30. I had a firm impression " ' that she understood that she was entering into a temporary " ' grazing agreement for less than one year.' " In those circumstances, it seems to me that the judge was amply justified in saying, as he did later in his judgment, " I am satisfied that

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" the original agreement was an agreement for the letting of the " land made in contemplation of the use of the land only for " grazing or mowing. This appears from the agreement itself. " There is also much evidence (to which I have referred) that " this is what the parties contemplated and that the land was " used by the defendant ' only for grazing or mowing.' "

That being so, and the conclusion up to that point being, as I respectfully think, entirely correct, the next point was whether the agreement was to be one for a specified period of a year. As my Lord has said, this point does not really permit of elaborate argument or discussion. The judge, I think, put the matter very clearly when he said: " In my view, 364 days is " a period of the year "—I think that that is absolutely correct— " and that period was specified in the agreement by the parties " to it. I hold, therefore, that the original agreement came within " the proviso to section 2."

I can see no escape from that reasoning, and in my judgment it is entirely correct. Then, when the period ended, there was a further period. The actual conclusion of the judge with regard to this matter is not challenged, that is to say, it is not suggested that the approach was on wrong lines or was directed by wrong principles. The judge said: " I find that neither party intended " to create a tenancy for successive periods of 364 days. I find " that the defendant knew that the most she could get by holding " over was a new tenancy for 364 days on similar terms to those " of the original tenancy, as it had been made so clear to her that " no other tenancy would be granted to her." That, again, as I think, was a finding that was entirely correct.

But in regard to that part of the case an additional argument has been addressed to us, that inasmuch as this further period was a period that arose by implication, then it was not for some specified period of the year; for it is said that if the period arises by implication it cannot be " specified." In my judgment, that reasoning is not sound. For the later period there was a necessity to resort to some extent to implication, but that merely means that, in the absence of a new agreement in writing, or in the absence of terms wholly and completely orally expressed, the judge found that there was material from which he could infer or imply what the new contract was. But it is quite clear what the new contract was and what were the terms that the parties agreed. They were terms similar to those that they had previously agreed. Therefore, in the new contract they agreed to terms one of which was that the period was to be 364 days, which, in my judgment, is a specified period within the meaning of the words of the proviso. I therefore think that the judge came to a correct conclusion in this case.

PARKER L.J. I entirely agree with both judgments which have been delivered and there is nothing that I can usefully add on what is a very short point.

Appeal dismissed.

Solicitors: *Langhams & Letts for Dawson & Hart, Uckfield; Bulcraig & Davis.*

A. W. G.

HEALEY *v.* MINISTER OF HEALTH.

[1953 H. No. 2923.]

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Nov. 1, 2, 10.

Denning, Morris and Parker L.JJ.

National Health Service—Superannuation—Determination by Minister —Whether subject to review—Plaintiff's claim to be a mental health officer within the meaning of the regulations—Prior determination by Minister that plaintiff not a mental health officer—"Any question "arising under these regulations . . . shall be determined by the "Minister"—Whether jurisdiction of court to determine plaintiff's claim ousted by regulations—Powers of the court—Powers of the Minister—National Health Service Act, 1946 (9 & 10 *Geo.* 6, c. 81), s. 67 (1)—*National Health Service (Superannuation) Regulations,* 1950 (*S.I.* 1950, *No.* 497), *reg.* 60.

Minister—Determination by—Whether subject to review by courts.

By the National Health Service Act, 1946, s. 67 (1): "Regulations may provide (*a*) for the granting out of moneys provided by "Parliament of superannuation benefits to officers of such classes "as may be prescribed . . . (*i*) for the determination of all questions "arising under the regulations by the Minister." By regulation 60 of the National Health Service (Superannuation) Regulations, 1950, "Any question arising under these regulations as to the rights or "liabilities of an officer . . . or of a person claiming to be treated as "such . . . shall be determined by the Minister."

The Minister of Health determined, pursuant to regulation 60 of the National Health Service (Superannuation) Regulations, 1950, that the plaintiff, a shoemaker employed by a hospital management committee in the shoemaker's shop of a mental hospital, was not a mental health officer within the meaning of the regulations. The plaintiff brought an action against the Minister for a declaration that he was a mental health officer within the meaning of the

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regulations. The Minister raised a plea in bar to the plaintiff's claim that by virtue of section 67 (1) of the National Health Service Act, 1946, and regulation 60 of the regulations made under that section, his determination was final and not subject to review or appeal in the courts. On a preliminary issue whether the court had jurisdiction to grant to the plaintiff the relief sought:—

Held, that, the plaintiff by his pleading not having asked for a declaration that the Minister's determination was invalid or asserted that the determination of the Minister was wrong in law or that the Minister lacked jurisdiction, but having invited the court to assume an appellate jurisdiction, which it had not been given and could not create, the appeal must be dismissed.

Decision of Cassels J. [1954] 2 Q.B. 221; [1954] 2 All E.R. 580 affirmed.

APPEAL from Cassels J. on preliminary point of law.[1]

By a letter dated December 31, 1952, written on behalf of the Minister of Health to the plaintiff, a shoemaker employed by the Morgannwg Hospital Management Committee, the Minister determined, pursuant to regulation 60 of the National Health Service (Superannuation) Regulation, 1950,[2] that the plaintiff was not a mental health officer within the meaning of the regulations.

The plaintiff in an action brought against the Minister, claiming a declaration that he was, and at all times had been, a mental health officer within the meaning of the regulations, alleged by his statement of claim that the Minister had in his letter designated as mental health officers " all officers employed " in hospitals used wholly or partly for the treatment of mental " patients who devote the whole or substantially the whole of

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[1] [1954] 2 Q.B. 221; [1954] 2 All E.R. 580.

[2] National Health Service Act, 1946, s. 67: " (1) Regulations may " provide (*a*) for the granting out of " moneys provided by Parliament of " superannuation benefits to officers " of such classes as may be prescribed " . . . (*g*) for making special provision for special classes of persons; " . . . (*i*) for the determination of all " questions arising under the regulations by the Minister."

National Health Service (Superannuation) Regulations, 1950 (made under s. 67 (1) of the National Health Service Act, 1946), reg. 1: " (3) . . . 'mental health officer' " means an officer on the medical or " nursing staff of a hospital used " wholly or partly for the treatment of " mental patients . . . who devotes the " whole or substantially the whole of " his time to the treatment or care of " such patients . . . and such other " classes or descriptions of officers " employed in such hospitals . . . as " the Minister may designate." Reg. 60: " Any question arising under " these regulations as to the rights " or liabilities of an officer or retired " officer of an employing authority, " or of a person claiming to be treated " as such . . . shall be determined " by the Minister."

"their time to the treatment or care of such patients," and that he, the plaintiff, devoted the whole or substantially the whole of his time to the treatment or care of such patients, in that he and a charge-hand conducted the shoemaker's shop at the hospital, and during working hours mental patients employed in the shop were in his care and, at times, in his sole charge. He claimed that shoemaking and repairing was occupational therapy and part of the treatment which the patients received.

By his defence the Minister denied that the plaintiff devoted the whole or substantially the whole of his time to the treatment or care of mental patients. He further raised a plea in bar to the plaintiff's action, contending that, as regulation 60 provided that any questions arising under the regulations as to the rights or liabilities of any person claiming to be a mental health officer should be determined by the Minister, his determination by the letter of December 31, 1952, was final and not subject to review or appeal, and therefore the court had no jurisdiction to consider the plaintiff's claim.

The Master having directed that the question of law raised by the Minister's plea in bar should be tried as a preliminary issue, the matter came before Cassels J., who on June 4, 1954, held that the court had no jurisdiction to consider the question raised by the plaintiff's claim, and gave judgment for the Minister on the preliminary issue.

The plaintiff appealed.

P. M. O'Connor for the plaintiff. It is admitted that the plaintiff is a shoemaker in the workshop of the hospital and that his work is occupational therapy, but the Minister has held that he is not a mental health officer within the regulations made under section 67 (1) of the National Health Service Act, 1946. The effect of the Minister's decision is that the plaintiff will have to put in five years more service before qualifying for superannuation. Regulation 1 of the National Health Service (Superannuation) Regulations, 1950, describes a mental health officer as "an officer on the medical or nursing staff of a hospital . . . who "devotes the whole or substantially the whole of his time to "the treatment or care of [mental] patients." Regulation 60 provides that "any question arising under these regulations as "to the rights . . . of an officer . . . or of a person claiming to be "treated as such . . . shall be determined by the Minister." It is not said that his determination shall be final. All citizens have a right to come to the Queen's courts and that right can only be taken away from them by express words in a statute, or by necessary implication, or by agreement to give the decision to somebody else, as in arbitration. The plaintiff has a right to be heard by the court. The Minister is claiming to act as sole judge in his own cause. He has made a determination which he wants to have recorded as unchallengeable in a court of law. If that is correct a grievous injustice might be committed and the victim would be without remedy. The judgment of Hallett J. in *East Midlands Gas Board* v. *Doncaster Corporation* [3] is wrong. That case may not be distinguishable from this case, but the judgment is too wide. It is based on *Crisp* v. *Bunbury* [4] and *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.*,[5] both of which are arbitration cases.

A heavy burden rests on the defendant to show that by express words Parliament has excluded the jurisdiction of the courts. The words of section 67 (1) of the National Health Service Act, 1946, are not sufficient to enable the Minister to say that Parliament has given him exclusive jurisdiction in this matter. When Parliament gives exclusive jurisdiction it says so in plain language: see National Service (Armed Forces) Act, 1939, ss. 5 (12) and 6 (9); National Insurance (Industrial Injuries) Act, 1946, s. 36 (1) and (3), and the National Insurance Act, 1946, s. 43 (1), where the decision of the Minister is to be final, but provision is made in the last two of those Acts for some appeals to the courts. The Minister, to succeed in this case, must be able to show that the jurisdiction of the courts is ousted by implication, and that implication can only be drawn where the whole object of the statute points plainly to exclusive jurisdiction in the tribunal which is set up. That is not the case here. It cannot be implied from the wording of the regulations that Parliament intended that the Minister should be the sole tribunal, to the exclusion of the courts. It is admitted that the determination must in the first instance be made by the Minister, but it does not follow that one cannot afterwards go to the courts. It prevents the matter coming to the courts without a decision by the Minister, but does not oust the courts' jurisdiction. It is not suggested that there is anything wrong in the jurisdiction of the Minister, but the court is asked to act on the theory that there has been a mistake which should be rectified. The courts have an inherent jurisdiction to see that injustice is not done and there appears to be no authority to show that the courts have no jurisdiction to grant a declaration.

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[3] [1953] 1 W.L.R. 54; [1953] 1 All E.R. 54.

[4] (1832) 8 Bing. 394.

[5] [1904] 2 Ch. 123.

[MORRIS L.J. Suppose the Minister adhered to his determination. What then?]

The plaintiff could move for a mandatory declaration requiring the Minister to put the plaintiff on the right register. The plaintiff might have proceeded by way of certiorari, but it is submitted that the machinery of a declaration is a better procedure in this class of case. The defence of the Minister is not, it is submitted, a plea in bar. Such a plea can only arise from the wording of the statute and the necessary words are not to be found in either the statute or the regulations. [The following cases were also cited: *Andrews* v. *Mitchell* [6]; *Gillingham Corporation* v. *Kent County Council* [7]; *Barnard* v. *National Dock Labour Board*.[8]]

Sir H. Hylton-Foster Q.C., S.-G. and *R. J. Parker* for the Minister. This court is invited to consider a plea in bar. It is not within the province of counsel for the Minister to say what are the circumstances in which a declaration is the appropriate remedy, but aside altogether from the question of whether the jurisdiction of the courts is ousted, it is submitted there is no jurisdiction in this court to do that which it is sought to do in the present action, namely, to substitute a determination of this court for the decision of the inferior tribunal. An order of certiorari can be granted to bring into the Queen's Bench Division to be quashed a decision of an inferior court, such as a statutory tribunal, on the ground of an error on the face of the record: *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*.[9] But in this case the court is asked to substitute another order. This court has not an appellate jurisdiction in this connexion, but only a supervisory capacity. The supervisory capacity is not challenged, but the purpose of the plea in bar is to prevent the court from assuming a jurisdiction which it has not got. The plaintiff has put forward no authority for any such jurisdiction. It is not conceded that the legislative words in the statute and regulations are inapt to exclude this jurisdiction, if it exists. The decision of Hallett J. in *East Midlands Gas Board* v. *Doncaster Corporation* [10] was right. Here is a positive statutory enactment saying that a certain category of problems shall be determined by the Minister, and it is not said, and there is no reason to imply, that his determination shall be subject to appeal. The legislature has power to entrust such matters to a Minister, and reasonably does so, as a convenient course which avoids litigation.

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[6] [1905] A.C. 78.

[7] [1953] Ch. 37.

[8] [1953] 2 Q.B. 18; [1952] 2 T.L.R. 309.

[9] [1952] 1 K.B. 338.

[10] [1953] 1 W.L.R. 54.

Cur. adv. vult.

November 10. The following judgments were read.

DENNING L.J. At Bridgend in Glamorganshire there is a mental hospital which is managed by a hospital management committee under the National Health Act, 1946. The patients at the hospital do shoemaking and shoe-repairing because it helps to cure them. It is occupational therapy forming part of the treatment. The shoemaker's shop where they work is under the control of a chargehand, and he is assisted by Mr. Thomas John Healey, who is the plaintiff in this action.

A question has arisen whether Mr. Healey is a "mental "health officer" within the meaning of the National Health Service (Superannuation) Regulations, 1950. It is an important matter for him, because if he is a mental health officer, he is entitled to more favourable terms of superannuation than he would otherwise be. Under the definition section in those regulations he is a "mental health officer" if he devotes "the whole "or substantially the whole of his time to the treatment or care "of" the patients. The question is whether Mr. Healey comes within that definition.

The regulations provide that that question is to be determined by the Minister. Regulation 60 says that: "Any question "arising under these regulations as to the rights or liabilities "of an officer or retired officer . . . or of a person claiming to "be treated as such . . . shall be determined by the Minister." In accordance with that regulation the question was referred to the Minister, who determined it against Mr. Healey. His decision was given in a letter of December 31, 1952, in these words: "National Health Service (Superannuation) Regulations, 1950 "to 1952. I am directed by the Minister of Health to refer to "the representations made on your behalf and to inform you "that he hereby determines under regulation 60 of the above-"mentioned regulations that in your employment as shoemaker "at Morgannwg Hospital you are not a mental health officer "within the meaning of those regulations. The Minister has

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"designated as mental health officers all those officers who "devote the whole, or substantially the whole, of their time to "the treatment or care of mental patients or defectives. He has "considered fully all the evidence before him in relation to your "duties. Even if he accepts your own estimate of six to eight "hours (instead of that of the hospital management committee "of four hours) a week as the time during which the chargehand "is away from the shop and you are fully responsible for the "patients working there, he is unable to find that you devote "substantially the whole of your time to the treatment or care of "such patients. Your employment is not, therefore, of such "a nature as to make you a mental health officer. I am, Sir, "Your obedient servant, (Sgd.) J. F. Hunt."

Mr. Healey was dissatisfied with the Minister's decision and he has brought this action against the Minister in which he claims a declaration that he "is and was at all material times "a mental health officer within the meaning of the National "Health Service (Superannuation) Regulations, 1950." In answer to this claim the Minister contends that "this honourable "court has not jurisdiction to grant to the plaintiff the relief "sought herein or any part thereof." This question of jurisdiction has been ordered to be tried as a preliminary issue. Cassels J. decided that the court had no jurisdiction to grant the relief. The plaintiff appeals to this court.

The plaintiff's object is clear: he is seeking in these proceedings to get the court to say that the Minister's decision was wrong. It was wrong, he says, either in law or in fact or in both, but it was certainly wrong; and that is a ground for the court making a declaration saying what the right order should have been.

Since *Barnard* v. *National Dock Labour Board* [1] I take it to be clear law that the Queen's courts can grant declarations by which they pronounce on the validity or invalidity of the proceedings of statutory tribunals. Mr. O'Connor prayed that case in aid. He took an instance where the Minister had made a palpable error. Suppose, he said, that a man had served more than 10 years and had reached the age of 60. Under regulation 7 he would be entitled to a pension. But suppose the Minister determined that he had no right to one. Would not the courts interfere? I think they would. There would in that case be good reason for thinking that the Minister had mistaken or misused his powers: and the court would on that ground declare his determination to be invalid, in much the same way as it can declare the decision of a valuer to be invalid: see *Dean* v. *Prince*.[2]

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[1] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113.

The present case is not of that kind. The relief which is sought does not include a declaration that the Minister's determination was invalid. It seeks only a declaration that the plaintiff is and was a mental health officer. It is obvious that if the court were to consider granting this declaration it would have to hear the case afresh. Mr. Healey would have to give evidence showing how he spent his time, and the Minister would have to be allowed to give evidence in answer to it. In short, the court would have to rehear the very matter which the Minister has decided. If the court were to embark on a rehearing of this sort there is no telling where it would stop. Every person who was disappointed with a Minister's decision could bring an action for a rehearing. That would be going much too far. And suppose that the court did rehear the matter and decide in Mr. Healey's favour, and grant the declaration for which he asks, what would happen to the Minister's decision? So far as I can see, it would still stand unless the Minister chose of his own free will to revoke it. There would then be two inconsistent findings, one by the Minister and the other by the court. That would be a most undesirable state of affairs. In my opinion, if the court were to entertain this declaration, it would be going outside its province altogether. It would be exercising a jurisdiction to "hear and determine" which does not belong to it but to the Minister.

At one stage in the argument Mr. O'Connor sought leave to amend and claim a declaration that the Minister's decision was void, but he had to concede that it was too late to amend now for the purposes of the preliminary issue.

In conclusion I would say that the questions arising under these regulations are for the most part much more suited for determination by the Minister than by the court. The courts have ample powers to see that the Minister does his work properly, but they should not seek to do it for him, or to do it all over again, possibly with a different result. If a question of law should arise on which it is desirable that the opinion of the High Court should be taken, the Minister will no doubt give a reasoned decision, and the court can review it by the procedure laid down in *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*,[3] or, alternatively, by a declaration. That has been done in many cases lately and very beneficial it has proved. If Mr. Healey had asked for a reasoned decision in this case raising a point of law, I do not doubt that the Minister would have granted it, and it could have been reviewed; but, as he did not ask for it, I do not think we should permit him to question the correctness of the decision by these proceedings. I think that this appeal should be dismissed.

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[2] [1954] Ch. 409; [1954] 1 All E.R. 749.

MORRIS L.J. This appeal is from the decision of the judge on a preliminary issue and it is important, therefore, to refer to the scope and definition of the issue. In the order made by the master it was defined as "the question of jurisdiction raised "in paragraph 3 of the defence." By his statement of claim the plaintiff, who is employed at the Morgannwg Hospital, Bridgend, in the County of Glamorgan, set out the designation made by the defendant of "mental health officers." Though the action is brought against the Ministry of Health, the references throughout in the pleadings are to the Minister. Those whom the Minister designated as "mental health officers" were "all "officers employed in the hospitals used wholly or partly for the "treatment of mental patients . . . who devote the whole or "substantially the whole of their time to the treatment or care "of such patients." In his statement of claim the plaintiff set out the facts concerning his work which he alleged and on which he relied in support of his contention that he was a mental health officer within the meaning of the National Health Service (Superannuation) Regulations, 1950. If the plaintiff's contention is correct, the practical significance of this for him is that he becomes entitled to superannuation at a date earlier than if he is not a mental health officer.

Section 67 of the National Health Service Act, 1946, empowered the Minister to make regulations in regard to the superannuation of officers, which regulations could provide (see section 67 (1) (i)) "for the determination of all questions arising "under the regulations by the Minister." Regulations were made within the powers of the Minister: they are the National Health Service (Superannuation) Regulations, 1950 (S.I. 1950, No. 497).

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[3] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

[His Lordship read regulation 60 and continued:] The question arose as to the status of the plaintiff. The statement of claim pleaded further that "by letter to the plaintiff dated "December 31, 1952, signed by one J. F. Hunt on behalf of "the defendant, the defendant determined pursuant to regulation "60 that the plaintiff was not a mental health officer within the "meaning of the said regulations." The plaintiff then claimed "a declaration that the plaintiff is and was at all material times "a mental health officer within the meaning of the National "Health Service (Superannuation) Regulations, 1950." Further and other relief was also claimed. The position is, therefore, that having set out that the Minister had determined the rights of the plaintiff and having set out what was the determination, the claim advanced in the pleading is that the court should embark on a new determination, and, without cancelling or revoking the Minister's determination, should arrive at a new one contrary to that of the Minister.

In paragraph 3 of the defence it is pleaded that "the determination of the Minister referred to in . . . the statement of "claim is final and is not subject to review or appeal by way of "the proceedings herein or at all. The defendant will contend "that in the premises this honourable court has not jurisdiction "to grant to the plaintiff the relief sought herein or any part "thereof and that the statement of claim discloses no cause of "action." The preliminary issue concerns the question of jurisdiction so raised. It seems to me clear that what is claimed in the statement of claim is a review, by way of appeal, of the decision of the Minister. The court is being asked to decide a question which by regulation 60 is to be determined by the Minister. The court is not asked to revoke the Minister's determination; and if the court made a declaration as asked, the fate of the Minister's determination might remain obscure. But in substance what is undoubtedly sought is a declaration binding on the Minister which would reverse his previous decision. This can only mean that the plaintiff is seeking to appeal from the Minister. His action and his claim can have no other significance or intention. The plaintiff is asking the court to assume a jurisdiction to overrule the Minister. By raising the preliminary issue the defendant invites the court to rule now that it is not endowed with any jurisdiction to grant the relief sought. In my judgment there is no right of appeal to the court from the determination of the Minister. None is given by regulation 60 or in any other regulation. There can certainly be no implication of a right of appeal. Had it been desired to provide some machinery or procedure for an appeal from the decision of the Minister, it could have been done. Any such prescribed appeal might or might not have been an appeal to the courts. Questions as to which methods for determining rights are the most desirable raise issues of policy which are for Parliament to decide. But the courts cannot invent a right of appeal where none is given. The courts will not usurp an appellate jurisdiction where none is created.

This is sufficient to dispose of this matter, and no occasion arises to express an opinion as to what might have been the possibilities had there been different facts and different assertions and different claims. There has been no application for an order of certiorari, and it has not been suggested that any error of law is revealed on the face of the determination of the Minister as recorded in the letter of December 31, 1952. In the exercise of their supervisory jurisdiction over inferior courts, Her Majesty's courts are always strict in seeing that inferior courts comply with and observe the law and that their proceedings are in order and within their powers. The powers which are exercised over inferior courts are supervisory and controlling powers. In the present case it is to be noted that there is no suggestion that the Minister lacked jurisdiction. It is not said that there was any irregularity of proceeding. It is not said that there was any failure to make due inquiry or that the Minister acted contrary to the principles of natural justice. There is no pleading that the determination of the Minister was wrong in law: whether if there had been any such pleading of error of law it could have assisted the plaintiff is not a matter which can be disposed of on the hearing of this defined preliminary issue. By his pleading the plaintiff is inviting the court to assume an appellate jurisdiction which it has not been given and which the court cannot create.

PARKER L.J. Having regard to the decisions in *Crisp* v. *Bunbury*[4] and *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.*,[5] it is, I think, clear that the effect of regulation 60 is that a determination must be made by the Minister, at any rate in the first instance. It is not a case where, as in the case of a submission in a contract to arbitration, the court may decide the matter in the absence of an application to stay the proceedings and the grant in the discretion of the court of a stay.

[4] (1832) 8 Bing. 394.

[5] [1904] 2 Ch. 123.

In the present case the court could not decide the matter even if the parties consented. Indeed, this was conceded by counsel for Mr. Healey.

It is, however, contended that once the Minister has determined the matter the High Court has jurisdiction, in the absence of express words in the regulation to the contrary, to go behind the determination and to hold that it was wrong in law even though no error of law appeared on the face of the determination. In other words, it is contended that the court's supervisory jurisdiction is wide enough to enable it to declare a determination to be unlawful in the sense of being wrong in law even though the matter was not one which could form any ground for moving for an order of certiorari. This is at once a novel and far-reaching contention—novel in that so far as I know such a jurisdiction, if it exists, has never been invoked, and far-reaching in that, if valid awards of arbitrators and decisions of statutory tribunals, such as rent tribunals, would be open to review, even though there was no error on the face of such awards or decisions. For the reasons set out below, however, I find it unnecessary to consider this contention.

The matter comes before this court on an appeal from the decision of the judge on a preliminary issue which was ordered to be tried. The order was "That the question of jurisdiction "raised in paragraph 3 of the defence delivered herein be tried "as a preliminary issue." Paragraph 3 of the defence ends by stating: "The defendant will contend that in the premises this "honourable court has not jurisdiction to grant to the plaintiff "the relief sought herein or any part thereof and that the state-"ment of claim discloses no cause of action," and the relief claimed in the statement of claim is: "A declaration that the "plaintiff is and was at all material times a mental health "officer within the meaning of the National Health Service "(Superannuation) Regulations, 1950": in other words, the issue to be tried is whether, the Minister having made a determination, this court has jurisdiction, by declaration, not to declare that his determination is null and void or that it should be quashed, but to make another determination and one in the opposite sense to that made by the Minister.

In my opinion the court has no such jurisdiction. To hold otherwise would be to invest the court with an appellate jurisdiction, as opposed to a supervisory jurisdiction, which it certainly has not got. A right of appeal is the creature of statute, and the regulations give no right of appeal. Further, the absence of such words as "whose determination is final" or "whose "determination shall not be called in question in any court of "law" cannot preserve a jurisdiction which, apart from such words, did not exist.

The judgments of the Court of Appeal in *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*,[6] point the distinction between an appellate jurisdiction and a supervisory jurisdiction. In that case the court were considering the scope of the remedy by way of certiorari under the court's supervisory jurisdiction, and Singleton L.J. expressed his view in these words [7]: "The decision of the tribunal was a 'speaking order' "in the sense in which that term has been used. The court "is entitled to examine it, and if there be an error on the face "of it, to quash it—'not to substitute another order in its place, "'but to remove that order out of the way, as one which should "'not be used to the detriment of any of the subjects of Her "'Majesty,' as Lord Cairns said in *Walsall Overseers* v. *London "and North Western Railway Co.*[8]" Further, Denning L.J. said [9]: "The control is exercised by means of a power to quash "any determination by the tribunal which, on the face of it, "offends against the law. The King's Bench does not substitute "its own views for those of the tribunal, as a Court of Appeal "would do. It leaves it to the tribunal to hear the case again, "and in a proper case may command it to do so." And Morris L.J. said [10]: "It is plain that certiorari will not issue as "the cloak of an appeal in disguise. It does not lie in order to "bring up an order or decision for rehearing of the issue raised "in the proceedings."

In the present case the court, if it were to allow the proceedings to continue, would, in my view, be usurping a jurisdiction, namely, an appellate jurisdiction, which it does not possess. On this ground I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Foss, Bilbrough, Plaskitt & Co.; Solicitor, Ministry of Health.*

A. W. G.

[6] [1952] 1 K.B. 338.
[7] Ibid. 344.
[8] (1878) 4 App.Cas. 30, 39.
[9] [1952] 1 K.B. 338, 347.
[10] Ibid. 357.

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1954
Nov. 25;
Dec. 20.

Denning, Hodson and Parker L.JJ.

BULL *v.* BULL.

[Plaint No. K. 783.]

Tenants in Common — Realty — Dwelling-house — Joint purchase by mother and son as residence—Unequal shares—Conveyance in name of son—Legal ownership—Claim by son to eject mother—Equitable tenants in common—Rights of—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 1 (6), 14, 26 (3), 30 *and* 35—*Settled Land Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *s.* 36 (4)—*Trustee Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 14.

The plaintiff, jointly with his mother, purchased a dwelling-house as a home for themselves. The son provided the greater part of the purchase money and the conveyance was in his name. The mother did not intend to make a gift to the son of her part of the money. After they had lived in the house together for some four years the son married and it was arranged that the mother should occupy two rooms and the son and his wife the remainder of the house. Differences having occurred between the mother and her daughter-in-law the son gave his mother notice to quit and sued her in the county court for possession of the two rooms. The county court judge dismissed the action:—

No

~~[illegible] is disagreeable~~

~~should be ejected~~

Held, affirming the decision of the judge, that the mother was an equitable tenant in common with the son and that until the house was sold each of them was entitled, concurrently with the other, to possession of the premises, and that neither of them was entitled to turn the other out.

Per curiam. The son, who as legal owner held the property on a statutory trust for sale, could not sell it without the consent of the mother because he was unable to give a valid receipt for the proceeds. To satisfy section 14 of the Trustee Act, 1925, he could, however, appoint another trustee and, if the mother unreasonably refused her consent, could apply to the court under section 30 of the Law of Property Act, 1925.

Dicta of Sir Joseph Jekyll M.R. in *Cowper* v. *Cowper* (1734) 2 P.Wms. 720, 753; and of Maugham J. in *In re Warren* [1932] 1 Ch. 42, 47 applied.

APPEAL from Judge Clark sitting at Ilford County Court.

In 1949 the plaintiff, Bull, and his mother, the defendant, between them purchased the dwelling-house, 101 Rishden Gardens, Ilford. The plaintiff provided the greater part of the purchase money and the conveyance was made out in his name, it being the intention of the parties that the house should be a home for both of them. In 1953 the plaintiff married and it was arranged that the mother should have two rooms in the house.

Soon afterwards differences arose between the mother and her daughter-in-law and in consequence the plaintiff gave his mother notice to quit. The mother refusing to leave, the plaintiff brought the present proceedings for possession of the two rooms, contending that the mother was a mere licensee and that the licence having been revoked by the notice to quit she was a trespasser.

The county court judge held that in the circumstances the mother was an equitable tenant in common and could not be ejected by the plaintiff. The plaintiff appealed.

F. Burrows for the plaintiff. The judge held that the parties were tenants in common and that the mother was not a licensee and her only interest was a share of the rent and profits until the property was sold, and thereafter a share of the purchase price. It is submitted that on the facts the judge came to a wrong decision; that the mother was merely a bare licensee and the licence has been revoked. The mother being in occupation, the son cannot sell because he cannot give vacant possession without her consent. He could, however, appoint another trustee (see sections 14 and 36 (6) of the Trustee Act, 1925), and, should the mother unreasonably refuse her consent to a sale, he could then apply to the court under section 30 of the Law of Property Act, 1925, for an order giving leave to sell. In *In re Buchanan-Wollaston's Conveyance* [1] an order was refused by the court, but in that case there was an express covenant and the court would not assist the trustee to break that covenant. In the present case there is no suggestion that there is an express covenant.

[DENNING L.J. It might be implied. It would be very strange if one who had the legal title could sell the house over the head of the other tenant in common. In the words of Sir Wilfrid Greene M.R.[2]: "The court must consider whether it is "right and proper to make the order."]

It is submitted that the plaintiff here does not require an order of the court to sell. He comes to the court in his capacity as trustee and brings a straightforward claim for possession as legal owner.

L. B. Schapiro (*J. E. Williams* with him) for the defendant. Where equitable tenants in common are in possession it is impossible for one of them to sell without the consent of the other. If it is desired to take advantage of section 30 of the Law of

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[1] [1939] Ch. 738; 55 T.L.R. 604; [1939] 2 All E.R. 302.

[2] [1939] Ch. 738, 747.

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Property Act, 1925, the court must be satisfied that it is right and proper to exercise its discretion. The judge was fully entitled to find that the defendant was not a bare licensee. Moreover, it is a question of fact and is not appealable. An action for trespass on land does not lie between tenants in common: see Salmond on Torts, 11th ed., p. 237.

Cur. adv. vult.

1954. December 20. The following judgment was read by DENNING L.J. This is a most unfortunate dispute between mother and son. The son is now about 30 years of age and he has always lived with his mother. They have lived in several different houses, but the latest house since 1949 has been 101 Rishden Gardens, Ilford. This house was bought partly with her money and partly with his, but the son seems to have provided the greater part and the conveyance was taken in his name. In April, 1953, the son married and it was arranged that his mother should have two rooms in the house and that he and his wife would have the rest. Soon afterwards, however, differences arose between the mother and her daughter-in-law with the result that the son told his mother to leave the house. She has not, she says, been able to find other accommodation suitable to her needs and so she has not left. The son has therefore brought these proceedings to turn her out. In answer to the claim the mother says that, although the house stands in her son's name, she herself contributed quite a lot of money towards it, and that in these circumstances he cannot turn her out like this or, at any rate, not without paying her the amount which she put into it.

The judge has found that the mother did contribute a substantial amount towards the house and that she did not intend to make a gift of that money to her son. There was therefore no presumption of advancement, but a resulting trust in her favour. Furthermore, the judge has found that, when the house was bought, it was the intention of both mother and son that it, although taken in the son's name, should be a home for them both. He has held that in these circumstances the son cannot turn the mother out now as if she was a trespasser; and that his only remedy is by application to a court of equity. The son appeals to this court.

Similar circumstances must often arise in families, but strangely enough there is no authority on the point. The son is, of course, the legal owner of the house; but the mother and

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son are, I think, equitable tenants in common. Each is entitled in equity to an undivided share in the house, the share of each being in proportion to his or her respective contribution. The rights of equitable tenants in common as between themselves have never, so far as I know, been defined; but there is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and to the use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share the injured party can bring an action for an account. If one of them should go so far as to oust the other he is guilty of a trespass: see *Jacobs* v. *Seward*.[1] Such being the rights of legal tenants in common, I think that the rights of equitable owners in common are the same, save only for such differences as are necessarily consequent on the interest being equitable and not legal. It is well known that equity follows the law; and it does so in these cases about tenants in common as in others.

In support of this view I would refer to the words used by Sir Joseph Jekyll M.R. over 200 years ago in *Cowper* v. *Cowper*[2]: "The law is clear, and courts of equity ought to follow it in "their judgments concerning titles to equitable estates; otherwise "great uncertainty and confusion would ensue." I realize that since 1925 there has been no such thing as a legal tenancy in common: see section 1 (6) of the Law of Property Act, 1925. All tenancies in common now are equitable only and they take effect behind a trust for sale: see section 36 (4) of the Settled Land Act, 1925. Nevertheless, until a sale takes place these equitable tenants in common have the same right to enjoy the land as legal tenants used to have. Their position was well stated by Maugham J. in *In re Warren*.[3] "There is no doubt "that, since the coming into force of the Law of Property Act, "1925, the position of undivided owners is different from what "it was before. That Act, for the purpose of simplifying the "law, has introduced provisions for undivided shares, and has "made partition actions unnecessary and obsolete. But in sub- "stance the beneficial interests of the undivided owners in regard "to enjoyment so long as the land remains unsold have not been "altered, and it is true to say that the ordinary layman possessed

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[1] (1872) L.R. 5 H.L. 464.
[2] (1734) 2 P.Wms. 753.
[3] [1932] 1 Ch. 42, 47.

"of an undivided share in land would be quite unaware of any "alteration in his rights as the result of the Act."

My conclusion, therefore, is that, when there are two equitable tenants in common, then, until the place is sold, each of them is entitled concurrently with the other to the possession of the land and to the use and enjoyment of it in a proper manner; and that neither of them is entitled to turn out the other.

The question may be asked: What is to happen when the two fall out, as they have done here? The answer is that the house must then be sold and the proceeds divided between mother and son in the proper proportions. The son is the legal owner and he holds it on the statutory trusts for sale. He cannot at the present moment sell the house because he cannot give a valid receipt for the proceeds. It needs two trustees to give a receipt; see section 14 of the Trustee Act, 1925. The son could get over this difficulty by appointing another trustee (under section 36 (6) of the Trustee Act, 1925) who would agree with him to sell the house. The two trustees would no doubt have to consider the mother's wishes, but as the son appears to have made the greater contribution he could in theory override her wishes about a sale: see section 26 (3) of the Law of Property Act, 1925. The difficulty of the two trustees would be a practical difficulty because, so long as the mother is there, they could not sell with vacant possession.

The mother is entitled to rely on her equitable interest as tenant in common, which is preserved by two sections of the Law of Property Act, 1925. The first is section 14 which provides that the Act "shall not prejudicially affect the interest of any "person in possession or in actual occupation of land to which "he may be entitled in right of such possession or occupation." The second is section 35 which says that the trust for sale is subject to such provisions as may be requisite for giving effect to the rights of the persons interested in the land. The mother here is in possession and in actual occupation as equitable co-owner and by virtue of that interest she could not be turned out by the trustees except with her consent. In this situation if the trustees wished to sell with vacant possession the only thing they could do would be to apply to the court under section 30 of the Law of Property Act, 1925, on the ground that the mother's consent could not be obtained. The court could then make such order as it thought fit and this would include, I think,

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an order to turn the mother out if it was right and proper for such an order to be made: compare *In re Buchanan-Wollaston's Conveyance*[4] and *In re Hyde's Conveyance*[5].

My conclusion is, therefore, that the son, although he is the legal owner of the house, has no right to turn his mother out. She has an equitable interest which entitles her to remain in the house as tenant in common with him until the house is sold. If they fall out the house should be sold and the proceeds divided between them in the proper proportions; but he cannot at his will turn her out into the street. The house cannot be sold with vacant possession unless she consents to it. If she unreasonably refuses her consent, the son, by taking proper steps, can obtain an order for sale from the court and in aid of it the court can order the mother to go; but the court would only make such an order if it was satisfied that it was right and proper to do so and on such terms as to alternative accommodation as it thought right to impose. I find myself, therefore, in agreement with the county court judge and I would dismiss this appeal.

Hodson L.J. has asked me to say that he has read my judgment and agrees with it.

Parker L.J. I also agree and have nothing to add.

Appeal dismissed.

Solicitors: *Canter, Hellyar & Co.; Daybell, Court, Cooper & Co.*

A. W. G.

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[4] [1939] Ch. 738.

[5] (1952) L.J.N. 58.

ETAM LD. *v.* FORTE AND ANOTHER.

[Plaint No. J. 1340.]

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Evershed M.R., Hodson L.J. and Lloyd-Jacob J.

Landlord and Tenant—Act of 1954—*Transitional provisions—Application for a new lease—Application dismissed by county court judge on June* 25, 1954—*Appeal—Whether "proceedings pending" under Act of* 1927 *on October* 1, 1954—*Landlord and Tenant Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *Sch. IX*, *para.* 8.

Landlord and Tenant—Act of 1927—*Goodwill—Application for new lease—Whether grant reasonable—Covenant not to apply for new lease—Remodelling of premises—Landlord and Tenant Act*, 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4, 5, 9.

The tenants, a limited company, having been tenants of shop premises fronting on to Piccadilly Circus since 1925, in 1951, when their lease expired, had served a notice under the Landlord and Tenant Act, 1927, on their landlords, a limited company, claiming a new lease. After negotiations, a new lease was granted to them for a term of 21 years, the rent being increased by £1,750 per annum. There was included in the lease an additional area of some 40 square feet to enable the tenants to construct a new staircase. The lease contained a provision that, if the landlords sold the premises and their adjoining premises, it should be lawful for them or their successors in title to determine the term thereby granted by six months' notice to quit on payment of certain compensation. The tenants covenanted not to apply for compensation or the grant of a new lease under sections 4 and 5 of the Landlord and Tenant Act, 1927, if the term thereby granted was determined by notice. The original landlords had sold their premises; it was proposed to remodel the premises together with certain adjoining premises and notice to quit was served on the tenants on August 28, 1953. The tenants thereupon applied under section 5 of the Act of 1927 for the grant of a new lease. The referee, who heard their application, held that there was adherent goodwill and he assessed the compensation, if the tribunal should think fit to award it, at £5,250. He came to the conclusion that a new lease should not be granted. In February, 1954, an interim order had been made under section 5 (13) of the Act protecting the occupation of the tenants during the pendency of the proceedings. On June 25, 1954, the county court judge held that there was no case for granting a new lease. The tenants gave notice of appeal. On October 1, 1954, the Landlord and Tenant Act, 1954, came into operation. On appeal, the question arose as to the effect on the appeal of paragraph 8 of Schedule IX to the Act of 1954, which provided that "where at the commencement of this Act any proceed-"ings are pending on an application made before the commencement "of this Act to the tribunal under section 5 of the Landlord and "Tenant Act, 1927, no further step shall be taken in the proceedings "except for the purposes of an order as to costs":—

Held, (1) that the phrase "proceedings pending on an applica-"tion made before the commencement of this Act to the tribunal" in paragraph 8 did not apply to the appeal. Proceedings were no longer "pending" after the tribunal had given its final judgment. Accordingly, the appeal had to be considered on its merits.

Cropper v. *Smith* (*No.* 2) (1884) 28 Ch.D. 148 considered.

(2) Dismissing the appeal on its merits, that on the proper construction of section 5 of the Landlord and Tenant Act, 1927, it was a matter of fact in the discretion of the tribunal to say whether in any case and in all the circumstances it would be reasonable to grant a new lease. Where a lease contained a covenant by the tenant not to apply for a new lease or to seek compensation under the Act of 1927, it was for the landlord to show under section 9 that there was "adequate consideration" for the covenant. Such consideration might be sought in matters outside the terms of the

lease itself. The fact that a tenant had entered into such a covenant was a matter relevant to be taken into consideration in determining the question of reasonableness.

Holt v. *Lord Cadogan* (1930) 46 T.L.R. 271 considered.

Appeal from Judge Blagden sitting at Westminster County Court.

The following statement of facts is taken from the judgment of Evershed M.R.: The appellants, Etam Ld. (hereinafter called the tenants), were a firm of retail sellers of women's clothes having 65 shops in various parts of the country. The subject-matter of the appeal was their lease of premises at 48, Regent Street, London, a part of Piccadilly Circus. Any shop in or in the immediate neighbourhood of Piccadilly Circus was one that for many purposes, including that of advertisement, enjoyed great advantages.

The respondents to the appeal were, first, Charles Forte, the immediate landlord during the pendency of the tenants' lease, and, secondly, Chesham House (Regent Street) Ld., who were the owners of the reversion expectant of the interest of the first respondent. Both those respondents came upon the scene at a date later than that of the commencement of the lease last enjoyed by the tenants. The tenants had been in occupation of the premises, or all of them save an area of some 30 of 40 square feet, since the year 1925. The lease under which they had held the premises came to an end in 1951. The tenants then took the first step necessary to protect their interests by serving a notice upon the then landlord, Tavistock Restaurants Ld., that they proposed to make a claim under the Landlord and Tenant Act, 1927, for a new lease. Negotiations followed between the tenants and Tavistock Restaurants Ld. or their respective agents. On December 5, 1951, a new lease was executed which had certain features of a somewhat unusual character.

First, the subject-matter demised included some property, immediately adjacent to the subject of the former lease and measuring in superficial area 30 or 40 square feet, which had not formerly been leased to the tenants. The object of including that area was to enable the tenants to erect a staircase to enable them to make use of the first floor, in addition to the ground floor, as a place whereon they could exhibit their goods and sell them. It appeared that the total cost of erecting the staircase amounted to £10,000, of which rather more than half was made up of the cost of the structural alterations. The rent payable was increased by £1,750 per annum to £4,250 per annum. The rental value of this property had in the meantime appreciably gone up, but, according to some of the evidence, £4,250 was less than the market rental, at that time, of those premises. The term of that demise was 21 years from December 25, 1951, but it was expressed to be determinable as thereinafter mentioned.

The second remarkable feature of the lease was clause 4 (*a*), which provided: "If at any time during the continuance of the "term hereby created the lessors shall contract to sell or let on "long lease with vacant possession the demised premises and "their adjoining premises known as . . . or to pull down or "reconstruct such premises it shall be lawful for the lessors to "determine the term hereby created by six months' previous "notice in writing delivered to the lessees at their registered "office," etc. "And in the event of such notice being duly "given this lease and everything herein contained shall as from "the date of the expiry of the notice cease and determine and "the lessees shall not be entitled to any compensation or damage "in respect of such determination save that if the term hereby "created shall in consequence of notice cease and determine "during the first seven years hereof the lessor shall pay to the "lessee" certain sums. The first figure represented about half the cost of the structural alterations contemplated. The second, and much smaller, figure represented the amount which the tenants had to pay in restoring the decoration of the lessors' premises, which they injured in doing their construction work. In addition to the general provision that the tenants were not to be entitled to compensation in respect of the determination save as thereby stated, there was a special provision and covenant on the part of the tenants that they would not apply for compensation or a new lease under section 4 or section 5 of the Landlord and Tenant Act, 1927, or any re-enacting Act "if and "when the tenancy hereby granted is determined in manner "hereinafter provided in clause 4 (*a*)."

That lease was determined, according to its language, by a notice to quit given on August 28, 1953. Tavistock Restaurants Ld. had ceased to be the reversioners, and the first respondent had acquired the premises and was within the definition of "lessors" in the lease and entitled to the benefit of its terms and of the lessees' covenants. The notice to quit was given with a view to the remodelling of the premises together with the adjoining premises of the respondents.

The tenants, notwithstanding the terms of their covenant, proceeded to make an application under section 5 of the Landlord and Tenant Act, 1927,[1] for a new lease, and that application was referred to a referee, Sir Alfred Wort. The referee intimated that he thought that there was, as a fact, proved adherent goodwill within the meaning of the Act, and he assessed compensation, if the tribunal should think fit to award it, at a sum of £5,250. He came, however, to the conclusion, again subject to the tribunal's view, that it was not a case in which a new lease should be granted. In the course of his report, he considered the point taken against the tenants that, by the terms of this new lease, they had contracted out of their right to make this present application. He was of opinion that there was here no adequate consideration and, therefore, he thought the whole matter open without any regard to the covenant.

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[1] Landlord and Tenant Act, 1927, s. 5: "(1) Where the tenant alleges "that, though he would be entitled to "compensation under the last fore-"going section, the sum which could "be awarded to him under that "section would not compensate him "for the loss of goodwill he will suffer "if he removes to and carries on his "trade or business in other premises, "he may in lieu of claiming such "compensation, at any time within "the period allowed for making a "claim under the said section, serve "on the landlord notice requiring a "new lease of the premises at which "the trade or business is carried on "to be granted to him."

"(2) Where such a notice is so "served, the tribunal, on application "being made for the purpose either "by the landlord or by the tenant not "less than nine months before the "termination of the tenancy, or, "where the tenancy is terminated by "notice, within two months after the "service of the notice, may, if it "considers that the grant of a new "tenancy is in all the circumstances "reasonable, order the grant of a new "tenancy for such period (being a "term of years absolute) not exceed-"ing fourteen years and on such terms "as the tribunal may determine to be "proper, but if the tribunal is pre-"cluded on any of the grounds "mentioned in paragraph (*b*) of the "following subsection from making "such an order the tribunal may "award such compensation as is pro-"vided under the last foregoing "section . . ."

"(3) Where the tenant is the "applicant, the grant of a new lease "under this section shall not be "deemed to be reasonable . . . (*b*) if "the landlord proves—(i) that the "premises are required for occupation "by himself, or, where the landlord "is an individual, for occupation by "a son or daughter of his over "eighteen years of age; or (ii) that "he intends to pull down or remodel "the premises; or (iii) that vacant "possession of the premises is "required in order to carry out a "scheme of re-development; or (iv) "that for any other reason the grant "of such lease of the premises would "not be consistent with good estate "management, and for this purpose "regard shall be had to the develop-"ment of any other property of the "same landlord; . . ."

"(13) Where it appears to the "tribunal that proceedings under this "section cannot be completed and a "new lease in accordance with the "order of the tribunal entered into "before the termination of the "tenancy of the tenant, and that the "delay is not due to any default on "the part of the tenant, the tribunal "may make an interim order autho-"rizing the tenant to continue in "possession of the premises for such "time after the termination of his "tenancy and on such terms as the "tribunal may allow."

S. 9: "This Part of this Act shall "apply notwithstanding any contract "to the contrary, being a contract "made at any time after the eighth "day of February, 1927: Provided "that, if on the hearing of a claim "or application under this Part of "this Act it appears to the tribunal "that a contract made after such date "as aforesaid so far as it deprives "any person of any right under this "Part of this Act, was made for "adequate consideration, the tribunal "shall in determining the matter give "effect thereto."

In February, 1954, an interim order had been made under section 5 (13) of the Act, designed to protect the occupation of the tenants during the pendency of the proceedings. The case went to the county court judge who, on June 25, 1954, gave his judgment, in which he held that no adherent goodwill had been established and that it was not, in any event, a case for granting a new lease. He wholly rejected the claim of the tenants based on section 5 of the Act. He granted what he described in the judgment as being a stay of execution.

The tenants served notice of appeal on July 8. The respondents cross-appealed in regard to the stay of execution granted by the county court judge.

On October 1, 1954, the Landlord and Tenant Act, 1954, came into operation.

H. J. Phillimore Q.C. and *R. Graham Dow* for the tenants. The court may be in a difficulty, having regard to the provisions of paragraph 8 of Schedule IX to the Act of 1954,[2] in hearing this appeal against the refusal to grant a new lease under the Landlord and Tenant Act, 1927. If those provisions have taken from the court jurisdiction to hear the appeal for the grant of a new lease, the appeal should stand over in order to allow an application to be made for the grant of a new lease under the Act of 1954. The tenants are asking for the grant of a new lease or, alternatively, for compensation. Paragraph 8 of Schedule IX to the

[2] Landlord and Tenant Act, 1954, Sch. IX, para. 8: "Where at the "commencement of this Act any proceedings are pending on an application made before the commencement "of this Act to the tribunal under "section 5 of the Landlord and Tenant "Act, 1927, no further step shall be "taken in the proceedings except for "the purposes of an order as to costs; "and where the tribunal has made "an interim order in the proceedings "under subsection (13) of section 5 "of that Act authorizing the tenant "to remain in possession of the property comprised in his tenancy for "any period, the tenancy shall be "deemed not to have come to an end "before the expiration of that period, "and section 24 of this Act shall have "effect in relation to it accordingly."

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Act of 1954 has not deprived the court of jurisdiction to hear the appeal so far as concerns compensation. With regard to the question of jurisdiction, notice of appeal was served on July 8, before the new Act came into operation and repealed sections 4 to 7 of the Act of 1927. The question is whether this appeal is a "proceeding" which is "pending" within the meaning of paragraph 8. If the answer is in the affirmative, the court only has jurisdiction, so far as the appeal relates to the grant of a new lease, to make an order as to costs. If the tenancy is still subsisting, the tenants can apply for a new tenancy under the Act of 1954. They can, however, ask on the appeal for compensation under the old Act. [Reference was made to section 38 of the Interpretation Act, 1889, and to *In re Talbot*[3]; *British and Colonial Furniture Co. Ld.* v. *William McIlroy Ld.*[4]; *Cropper* v. *Smith*[5]; and *Simpson* v. *Charrington & Co. Ld.*[6]] The Court of Appeal has power to send the proceedings back to the tribunal; it is accordingly not possible to say that proceedings are not pending to the tribunal.

With regard to the claim for compensation, it is necessary that the tenants should show that they have such a right under section 4 of the Act of 1927. [Reference was made to *Butlins Ld.* v. *Fytche*[7]; *Clift* v. *Taylor*[8]; and *Smith* v. *Metropolitan Properties Co. Ld.*[9]]

With regard to the merits of the case, the evidence shows that there is here adherent goodwill of substantial value. The fact that the premises may be partially demolished, so that the provisions of section 5 (3) (*b*) (iii) of the Act of 1927 apply, is not fatal to the tenants' case. They can claim compensation under section 4. Adequate consideration was not given for the tenants' covenant not to apply under the Act of 1927: *Holt* v. *Lord Cadogan.*[10]

H. Heathcote-Williams Q.C. and *George Avgherinos* for the first respondent, Charles Forte, were only called on to argue as to the jurisdiction of the court to hear the appeal. The reference in paragraph 8 of Schedule IX to the Act of 1954 to a pending application to "the tribunal" is to the tribunal defined in section 21 of the Act of 1927. There can be no proceedings after the coming into operation of the Act of 1954 to such a tribunal under section 5 of the Act of 1927. Paragraph 8, however, does not take away an accrued right of appeal. [Reference was made to *In re a Debtor.*[11]]

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[3] [1932] I.R. 714.

[4] [1951] 1 T.L.R. 295; [1951] 1 All E.R. 404.

[5] (1883) 24 Ch.D. 305.

[6] [1934] 1 K.B. 64; 50 T.L.R. 46.

[7] [1948] 1 All E.R. 737.

[8] [1948] 2 K.B. 394; 64 T.L.R. 346; [1948] 2 All E.R. 113.

[9] [1932] 1 K.B. 314.

[10] (1930) 46 T.L.R. 271.

D. E. Evans Q.C. and *K. J. T. Elphinstone* for the second respondents, Chesham House (Regent Street) Ld.

EVERSHED M.R. This case arises in consequence of an application under the Landlord and Tenant Act, 1927, and is one of no little complication, and to the complications inherent in this class of case before October 1, 1954, have been added those produced by the transitional provisions of the Landlord and Tenant Act, 1954.

[His Lordship stated the facts and continued:] I shall express no view upon any of the points that have been made about the validity of the interim order or the stay. I do not think that those are questions which arise on the present occasion.

Substantially the relevance of the Landlord and Tenant Act, 1954, is confined to the transitional provisions which are to be found in Schedule IX, particularly for present purposes, paragraph 8, which provides: "Where at the commencement of this Act "[October 1, 1954] any proceedings are pending on an application made before the commencement of this Act to the tribunal "under section 5 of the Landlord and Tenant Act, 1927, no "further step shall be taken in the proceedings except for the "purposes of an order as to costs; and where the tribunal has "made an interim order in the proceedings under section 5 (13) "of that Act . . . the tenancy shall be deemed not to have come "to an end before the expiration of that period. . . ." The expression "that period" means the period stated in the interim order.

Mr. Phillimore put forward some grounds for the view that the first part of paragraph 8 covered the present case; in other words, that this was a case in which there were "proceedings pending "on an application made before the commencement of this Act "to the tribunal," inasmuch as there was an appeal now still pending from the order made by the tribunal upon the application originally made by the tenants. If that submission were well founded, it would follow that all that could be done on this appeal would be to make an order as to costs. It is unusual for an appellant to intimate that the court to which he has appealed may have no jurisdiction to hear his appeal, but this Act received the Royal Assent and came into operation after the tenants had served their notice of appeal. Plainly, if it was thought by Mr. Phillimore that it might be in the better interest of the tenants to say that these proceedings should not continue and that they should be thereupon free to re-litigate the matter under the Act of 1954, it was not only his right but his duty to take that point on the tenants' behalf.

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[11] [1936] Ch. 237; 52 T.L.R. 70.

The respondents were very anxious that that should not happen. The attitude taken on both sides has made it plain, as indeed I understand is admittedly the fact, that, generally speaking, the new Act of 1954 is more favourable to the tenant in cases of this kind than was the Act of 1927. But I have come to the conclusion that the phrase "any proceedings are pending "on an application" is not applicable in the circumstances of the present case. There are several grounds for supporting that view. One is that in other and adjacent parts of the Act one gets a similar but distinct formula; one gets it, for example, in substantially the same words in section 64 (2) and in paragraph 10 (2) of Schedule IX. The formula is "proceedings on the "application (including any proceedings on or in consequence of "an appeal)." I appreciate that the words "in consequence "of" give on any view a particularly wide significance to the parenthesis; but still I am inclined to think that the contrast, which the parenthesis necessarily introduces, gives some ground for thinking that in paragraph 8 the words "proceedings pending "on an application" were not intended to cover the case of an appeal after judgment had been given by the tribunal. But there are other grounds also pointing in the same direction. One is the use of the words "to the tribunal" in the paragraph itself —"proceedings are pending on an application made . . . to the "tribunal under section 5." It was fairly pointed out by Mr. Heathcote-Williams that the words "to the tribunal" would really be otiose, except on the view that they were intended to make clear that it was only when the proceedings were pending before the tribunal that this paragraph was intended to take effect.

Two further points were made in the course of the argument: first, that if the proceedings are still pending after judgment by the tribunal and after service of the notice of appeal, then this curious result follows. This court could make, but could only make, an order as to costs and that would leave the judgment of the tribunal standing. The second point was this. Here the appellants are the tenants and, if the first part of paragraph 8 applies to this case, then they may well be able to say that they are given expressly the right in the second part of the paragraph to litigate the matter anew under the new Act. Whether they would be successful or not I am not, of course, concerned to decide. But, if the appellants were the landlord, and the appeal were no longer capable of being heard upon its merits, it is clear that the landlord would be left without any remedy whatsoever.

Finally our attention was drawn to decisions of the court, not upon this language, but upon somewhat similar language. I will refer by way of example only to one case, namely, *Cropper* v. *Smith* (*No.* 2),[1] where the question arose on the phrase "action "or legal proceedings pending" under the then Patent Act. The case is not on the language parallel, but that case and other cases referred to (the references may be found in Stroud's Judicial Dictionary, 3rd ed., pp. 2141, 2142, under the word "pending") show clearly enough that there is no inclination in the courts to give a priori a wide meaning to a formula like "proceedings "pending" or "matters pending."

The point was made that this court might (and there is authority for the view that in many cases it should) refer this case back to the county court judge; and that in such case there would be "proceedings pending" before the tribunal even after an appeal. But, in my opinion, this consideration is not sufficient to outweigh the others, which I have already mentioned, and which point the other way. For, in the case supposed, it may, to my mind, fairly be said that the proceedings ultimately "pending" before the tribunal were so pending, not upon the original application, but by virtue of an order of reference by this court. To my mind the proceedings are no longer pending within the meaning of the paragraph after the tribunal has given its final judgment. For those reasons, therefore, although it has not been the concern of the respondents here to argue to the contrary, I am satisfied, in my own mind, that paragraph 8 does not apply to this case and it therefore has become necessary for us to consider the matter upon its merits.

I think that there is a relatively short answer to this case. Section 5 (2) of the Landlord and Tenant Act, 1927, which states the jurisdiction of the tribunal in such a case as this, provides that the tribunal may, if it considers the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy, and it then goes on to provide—"but if the tribunal is "precluded on any of the grounds mentioned in paragraph (*b*) "of the following subsection from making such an order the "tribunal may award such compensation as is provided under the "last foregoing subsection." I think that the proper construction of those words is tolerably clear, and their effect is this: it is a matter of fact in the discretion of the tribunal to say whether, in any case and having regard to all its circumstances, it would be reasonable to grant a tenancy. But there is then added this limitation, that if a tribunal prima facie regards it otherwise as reasonable, it may nevertheless, because of one or other of the special grounds mentioned in paragraph (*b*) of the following subsection, be debarred from making the necessary order and, in that latter event, a special power is conferred upon the tribunal to award compensation instead, the compensation awarded being arrived at in accordance with the principles set out in the preceding section 4.

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[1] (1884) 28 Ch.D. 148.

In the present case reliance was placed by the first respondent on certain of the special prohibitions in paragraph (*b*) of section 5 (3). So far as is now relevant (for some have since been abandoned), they include that the first respondent does intend to remodel the premises; he also claims that the grant of a lease of the premises would not be consistent with good estate management.

As a fact, the judge was favourable to the respondents on both those matters; but we have not heard full argument upon them. It is not in doubt that these premises now are going to be remodelled, if the appeal should fail. We have seen the scheme presented graphically whereby what has hitherto been the shop premises of Etam Ld. will be incorporated into a large restaurant, the Monico Restaurant being the present component part of it. It was, however, said by Mr. Phillimore that, although that was no doubt so, the remodelling was not being done or was not intended to be done by the first respondent himself, but by a separate person in the eye of the law, namely, Forte & Co. Ld., or a company having a somewhat similar name, with which no doubt the first respondent is closely connected. I find it unnecessary to express my view on the question whether either of the prohibitions I have mentioned operates, because I am satisfied, as the judge was satisfied, that it would not in all the circumstances be in any case reasonable to order the grant of a new tenancy.

I now come back to the lease and the provision whereby the tenants covenanted not to make any claim under the Landlord and Tenant Act, 1927. It is not in doubt that in such cases, where there is such a provision, it is for the landlord to show that there is adequate consideration, which is (to borrow the language of Lord Hanworth M.R. sitting in the Divisional Court, in *Holt* v. *Lord Cadogan* [2]) to be treated as meaning "solid and "valuable." It is for the landlord to show that there is a solid and valuable consideration. The referee thought that there was not such a consideration, but I venture to think that his grounds for that view are wrongly confined to a consideration of the terms of the lease itself. The judge also intimated that he was against the respondents upon this matter, although he had heard no argument upon the point. I do not propose to express a view whether the tenants have established adequate consideration. I only observe that according to *Holt* v. *Lord Cadogan*,[2] from which I see no ground for dissenting, the consideration may be sought in matters outside the actual terms of the lease itself. I am not, therefore, to be taken as expressing approval or disapproval of the view taken by the referee or the judge on that question. But I am quite clear in my mind that the fact of the tenants having entered into such a covenant, in the circumstances that have been proved before us, is a matter relevant to be taken into account in considering the question of reasonableness.

By virtue of section 9, sections 4 and 5 are to apply notwithstanding the covenant. But that is not to say that the fact of the covenant having been entered into is to be wholly ignored. Mr. Phillimore indeed conceded that its existence was a circumstance relevant to the question of reasonableness, and I think it a highly significant circumstance. After all, we are here dealing with a very substantial and successful business which, during the negotiations, acted at arm's length with the then landlord and acted with the aid of agents, solicitors and so forth. There is no possible ground here for charging the then lessors with any dishonesty or deception. The document was, therefore, entered into by this board of directors or their representatives with their eyes open. It has, of course, turned out for them to be an unfortunate bargain; but it was made in terms quite plain, when they made this arrangement, that there was to be no question of a further term if the events which have happened should occur. In the absence, therefore, of any indication of overreaching, it seems to me that the making of that bargain is a most significant consideration. The circumstances which gave rise to the coming into operation of the covenant are likewise significant. They were that the premises were to be remodelled and reconstructed, and the sale to the first respondent was of course for the purpose of his carrying out that work. As I have said, I express no view upon it but, even if there is force in the technical point, that it is not the first respondent, but Forte & Co. Ld., which is doing the remodelling, still those facts are relevant circumstances on any view of it.

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[2] (1930) 46 T.L.R. 271.

Without therefore taking more time—indeed I am anxious to say as little as possible for reasons which I will explain—I think, with the judge (though I may have put the emphasis somewhat differently), that it would not be reasonable to order the grant of a new lease; and I base my decision on that conclusion rather than upon what I have called the prohibitions of one or other of the considerations in paragraph (*b*) of subsection (3); and it follows, as Mr. Phillimore concedes, that no question arises of an award of compensation in lieu of ordering a new lease.

There is lastly this. One of the most vexed questions under the Act of 1927 has been the exact interaction of sections 4 and 5. As the law at present stands according to the reported cases —I have in mind, for example, *Butlins Ld.* v. *Fytche*,[3] where Somervell L.J. considered the matter [4]—the failure of an application under section 5 is not a bar to an application for compensation under section 4, provided that the applicant-tenant has then gone out of possession.

It has been intimated by Mr. Phillimore that, subject again to the effect of the transitional provisions of the Act of 1954, he may desire to claim compensation under section 4, or under the corresponding section of the Act of 1954, and a preliminary objection no doubt to that claim will be the point made on the covenant against making any such claim. That being so, I desire to avoid expressing any view on the adequacy of the consideration within the meaning of section 9 of the Act of 1927, because it is not relevant to my conclusion. I prefer that it should be considered by the tribunal which hears the fresh application for compensation, if such an application is made. That tribunal ought to be free to consider the point entirely de novo and not regard the matter as in any way concluded by the view expressed by the referee and by the judge, who, as I have said, did not hear any argument upon it. I confine the basis of my judgment to my view that, in all the circumstances, it would be unreasonable to order the grant of a new tenancy to the tenants. I base myself upon that matter rather than upon the particular application of one or other of the limiting factors in section 5 (3); but for the reasons I have stated I think that this appeal fails and should be dismissed.

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[3] [1948] 1 All E.R. 737.

[4] Ibid. 741.

Hodson L.J. I agree with the judgment which has been delivered by the Master of the Rolls and with the grounds upon which that judgment is based. For my part, I think it better not to say anything about the issues in this case which may hinder or embarrass the parties, if unhappily they become involved in future disputes about this matter. I think that the judgment of this court can rest, as I think the judgment of the county court judge rested, on the view taken by him that, under section 5 (2) of the Landlord and Tenant Act, 1927, it was unreasonable in all the circumstances to grant a new tenancy; and I rely, as the county court judge relied in part, on the circumstance that in 1951 the tenants, in signing the lease on that date, agreed not to take proceedings for compensation under the Landlord and Tenant Act, 1927, and accepted the lease with the terms thereof in satisfaction of their claims.

In saying that, I am not closing the door on argument under section 9 of the Act whether, in itself, the agreement deprived the tenants of their rights under the Act, but I am not assenting to the tentative view expressed by the county court judge and the referee who considered the matter, namely, that the consideration was not adequate. This was a limited company, owning a substantial chain of shops, negotiating through their directors with the landlords, with the consideration before them of what was likely to happen in future, and, with their eyes open, the directors entered into this bargain. It seems to me, to put it at its lowest, difficult for them thereafter to resist the contention that an agreement entered into by them was made for adequate consideration. I agree that the appeal fails.

Lloyd-Jacob J. I also agree that in the circumstances disclosed in this appeal it would not be reasonable to order the grant of a new tenancy.

Appeal and cross-appeal dismissed.

Solicitors: *Adler & Perowne; Paisner & Co.; Slaughter & May.*

B. A. B.

RANDS *v.* McNEIL.

C. A.

[1953 R. No. 566.]

1954
Oct. 14;
Nov. 19.

Denning, Jenkins and Morris L.JJ.

Animal—Dangerous animal—Farm—Bull—Scienter—Animal kept in loose box untethered—Farm labourer injured on entering loose box —Question of liability.

Negligence—Safe system of work—General precautions.

The defendant, a farmer, kept a bull, which was known by him and his farm workmen to be dangerous. The animal had been de-horned and was kept untethered in a loose box. Some of the workmen, but not the plaintiff, had been warned not to enter the box until the bull had been secured, which was done by putting a staff, with a hook at the end of it, through a window and attaching the hook to a ring in the animal's nose. On the day in question the "beastman," M., intending to "muck-out" the loose box and having failed to secure the bull by way of the window, decided to enter the box by the door and asked the plaintiff, a labourer on the farm, to assist him by holding the door open as a means of escape, should it be necessary. M. having again failed to secure the animal by means of the staff and hook, the plaintiff offered to try and was doing so when the bull charged and severely injured him.

By the present action the plaintiff claimed damages from the defendant, his employer, on the ground that the defendant was keeping an animal ferae naturae and of a kind presumed in law to be dangerous, and therefore the principle of strict liability for any injury caused by the animal applied without proof of negligence. Alternatively, he claimed that the defendant was negligent in not keeping the bull tethered in the loose box and in not maintaining a safe system of work.

On appeal from Donovan J., who had dismissed the action, finding (1) that the method provided was a practicable method of securing the bull from the outside, and (2) that the plaintiff knew that it was dangerous to go into the box with the bull untethered within:—

Held, (1) that, since the principle of strict liability for injuries caused by an animal known to be dangerous did not apply where the animal had been placed under control and had not escaped, that principle was inapplicable here.

Knott v. *London County Council* [1934] 1 K.B. 126; 50 T.L.R. 55 applied.

Quaere: Whether the principle of strict liability applies as between a farmer and his employees.

(2) That (Denning L.J. dissenting) on the trial judge's findings the defendant was not negligent.

Per Denning L.J. Though the plaintiff was at fault in entering the loose box there had also been a faulty system of work for which the defendant was responsible, and he (his Lordship) would have awarded the plaintiff half his damages.

Decision of Donovan J. affirmed.

APPEAL from Donovan J., sitting at Leeds Assizes.

The plaintiff, Gladwyn Johnson Rands, was the senior labourer on the Yorkshire farm of the defendant, John McNeil. The defendant possessed a bull which he and his employees knew was dangerous, because it had chased a man in the farmyard and had also attacked the defendant himself. In consequence, the animal had been kept untethered in a loose box and its horns had been removed. It was never let out of the box, except when the box was to be cleaned out, and then only after it had been secured. The farmer had warned some of his men not to go into the box, and all of them knew of the dangerous nature of the bull.

On May 11, 1951, the "beastman," one Moss, decided to clean out the box and therefore wanted to catch the bull and tie it up. For this purpose, following the system in use on the farm, he got a staff with a hook on the end of it and by way of the window tried to get the hook through the bull's nose ring. The animal, however, was wary and backed away. Not having caught the bull through the window, Moss decided to go into the box through the doorway and asked the plaintiff to help him. The plaintiff agreed and kept the door open as a way of escape should Moss have to make a dash for safety. Moss having again failed to hook the bull with the staff, the plaintiff offered to try with the staff and was so doing when the animal charged, knocked him down against the wall and severely injured him.

The plaintiff brought the present action against the defendant, alleging negligence, failure to maintain a safe system and proper supervision of work; and failure to keep under proper control an animal known to him to be dangerous and liable to cause injury to persons.

On April 2, 1954, Donovan J. gave judgment dismissing the action.

The plaintiff appealed.

E. Ould for the plaintiff. If a person keeps a wild and savage animal, with knowledge of its dangerous propensities, he does so at his peril. He is liable for injuries that it causes to other persons. That is an absolute rule of law, the only exceptions being contributory negligence, trespass by the injured party and act of God. One only of these exceptions is available to the defendant, namely, contributory negligence, and that, since the passing of the Law Reform (Contributory Negligence) Act, 1945, is not a complete defence to liability but only a ground for reducing damages. In *May* v. *Burdett*[1] Lord Denman C.J. said: "The "gist of the action is the keeping of the animal with knowledge "of its mischievous propensities. The conclusion to be drawn "from an examination of all the authorities appears to be this: "that a person keeping a mischievous animal with knowledge "of its propensities is bound to keep it secure at his peril, and "that if it does mischief negligence is presumed without express "averment."

[DENNING L.J. Does that apply to a keeper?]

It applies to everyone unless there is some specific ground for exemption. In *Marlor* v. *Ball*[2] a plaintiff was bitten by a zebra in a zoo or exhibition. It was held that having interfered with the animal and provoked it he was not entitled to rely on the strict doctrine of scienter. In *Bowater* v. *Rowley Regis Corporation*[3] the plaintiff, a carter, employed to collect road sweepings, was ordered by his foreman to take out a horse which, to the knowledge of both of them, was liable to run away. The plaintiff suffered injury by being thrown from his cart. It was held that a man could not be "willing" unless he was in a position to choose freely. Unless volenti can be brought home to the plaintiff, and it is submitted that it cannot, it is not necessary for him to prove that his employer was negligent. It is submitted, however, that the defendant was negligent in that he failed to provide and maintain a safe system of work and suitable equipment. [*Smith* v. *Pelah*,[4] *Wyatt* v. *Rosherville Gardens Co.*[5] and Salmond on Torts, 11th ed., p. 469, were also referred to.]

Felix Denny for the defendant. Since the decision in *Marlor* v. *Ball*[6] it is open for the defence to plead that the plaintiff brought his injury upon himself. Though there is a strict liability on the keeper of a dangerous animal, there are exemptions, as has been admitted for the plaintiff. If the plaintiff brought the injury upon himself it is sufficient to excuse the defendant, even if the plaintiff was not negligent. In fact the plaintiff ought not to have entered the loose box. That was the cause of the injuries and not the failure of the defendant to have the bull tethered. The doctrine of absolute liability, moreover, does not apply to the present case. The farmer had taken careful precautions for the safety of his workmen. In *Knott* v. *London County Council*[7] Lord Wright said: "It is not unlawful or wrongful to keep such "an animal; the wrong is in allowing it to escape from the "keeper's control." The bull did not escape and but for the negligence of the plaintiff in entering the loose box there would have been no injury. [*Pearson* v. *Coleman Bros.*[8] and *Sylvester* v. *C. B. Chapman Ld.*[9] were also referred to.]

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[1] (1846) 9 Q.B. 101, 112.
[2] (1900) 16 T.L.R. 239.
[3] [1944] K.B. 480.
[4] (1746) 2 Str. 1264.
[5] (1886) 2 T.L.R. 282.
[6] 16 T.L.R. 239.

Cur. adv. vult.

November 19. The following judgments were read.

DENNING L.J. A Yorkshire farmer had a dangerous bull. He knew it was dangerous because the bull on one occasion had chased one of his men in the yard. The farmer thereafter kept the bull inside a loose box all the time. It was kept there untethered. On a later occasion the bull got the farmer himself against the wall of the box and the farmer then took his horns off. The bull was never let out of the box except when the box had to be cleaned out. Even the cows were taken into the box for service. The farmer told some of his men not to go into the box, but he never told his stockman, Moss, not to go in. He warned Moss that he must be very careful of the bull, but did not tell him not to go into the box. Nor did he tell his senior man, Rands, in terms not to go into the box, though no doubt Rands knew it was a dangerous thing to do and that he ought not to do it.

The accident happened because Moss and Rands on one occasion did go into the box. It came about in this way: The box had to be cleaned out. The stockman, Moss, wanted to catch the bull and tie it up whilst he cleaned out the box. The bull had, of course, a ring in its nose. Moss got a staff with a hook on the end of it and he tried to get the hook through the ring on the bull's nose. He tried this at first from outside the box. He put the staff through the window, but did not succeed in catching the bull; whereupon the bull became wary and backed away from the hook. To use Moss's own words: "I went round to the

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[7] [1934] 1 K.B. 138.

[8] [1948] 2 K.B. 359; [1948] 2 All E.R. 274.

[9] (1935) 79 S.J. 777.

" window and the bull he maybe was near enough to get with the " staff, but if you did not get him the first time you had had it. " He went to back away, or maybe he would go further to the " door and you had to go round and try and get him. If he got " into the far corner you could not reach him," and he added significantly: " You are all right if you can get him the first time " like." Not having caught the bull from outside, Moss decided to get some help to go inside; for otherwise he might have been outside there all day. He said: " I went and asked Rands if he " would give me a hand as I did not fancy going in to try and get " him by myself." Rands said that he would give him a hand and did so. First Moss went into the box whilst Rands stood at the door and kept it open in case Moss had to make a dash for safety. Moss failed to catch the bull, so Rands said: " Shall I " have a try?" They changed places. Rands took the staff and Moss held the door. Rands tried to hook the bull but as he was doing so the bull charged and knocked him down against the wall and severely injured him. Moss drove the bull off with a dung fork and Rands got out of the box, but he had a frightful wound to his left arm.

This is the first case, so far as I know, where the court has had to consider the liability of a farmer towards the men whom he employs to look after a bull or to help in looking after it. We were urged to say that his liability to his men was the same as to the public at large: and that, inasmuch as the farmer knew the bull was dangerous, it was his strict duty to keep it under control so that it should do no damage. The farmer keeps the bull, it was said, at his peril, even so far as his own men are concerned. I do not think that is the law. The duty of the farmer to his men is not a strict duty. It is the same as the duty of any other employer. He must take reasonable care not to subject his men to unnecessary risk. The only difference is that when he has a dangerous bull he must take very great precautions. It is trite knowledge that the greater the danger the greater the precautions that should be taken.

Apart from these general considerations, there is a narrower ground on which it can be seen that the farmer here is not under a strict liability. In order to impose strict liability even to the public it is essential to prove not only knowledge of the dangerous propensity of the animal, but also to prove that it escaped and did harm. Sir Matthew Hale put it very accurately in his Pleas of the Crown, vol. 1, p. 430. He said: " The owner

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"must at his peril keep him safe from doing hurt, for though "he uses his diligence to keep him up, if he escapes and "do harm, the owner is liable to answer damages." Lord Wright in *Knott* v. *London County Council*[1] said: "it is "not unlawful or wrongful to keep such an animal; the wrong "is in allowing it to escape from the keeper's control with "the result that it does damage." This is in full accord with the principle of *Rylands* v. *Fletcher*,[2] where "escape" is an essential condition of liability: see *Read* v. *J. Lyons & Co.*,[3] *per* Viscount Simon. Applying this principle, it is plain that the plaintiff cannot succeed on the ground of strict liability, for the simple reason that the bull never escaped at all. So far from the bull escaping, the man actually went into the loose box where it was kept and thus brought the danger on himself.

There remains, however, the question whether the farmer was guilty of negligence. The judge does not mention this point, the reason being, no doubt, because the case was fought before him mainly on the question of strict liability. But negligence was distinctly pleaded and we ought, I think, to consider it. There was much evidence of faulty system. The system which the farmer did in fact provide is best shown by his own description of it. He was asked: "(Q.) What was the procedure you laid "down for mucking out the box? (A.) That they should use "the staff provided for the job and get the bull either through "the half door on the foal yard side or preferably through the "window on the far side, but at no time had they to go into the "box." I cannot regard that system as satisfactory and for these reasons: (1) It was essential to the safety of the system that the men should be specifically instructed that they should not go into the box in any circumstances: but no such instruction ever reached the stockman, Moss, or the plaintiff, the senior farm hand, who were the two most likely to be affected by it. (2) It was an inefficient system which meant poking a hook at the bull's nose, a thing to which the bull would naturally object. The farmer ought, as the veterinary surgeon said, at least to have had a chain 18 inches long hanging down from the ring; for then the men could angle for the end of the chain, which the bull does not mind so much. (3) It was an inefficient system which depended on the chance of hooking the bull first time. If he was not caught first time, the men had to put off the job indefinitely until they could hook him. Good sturdy men like these would naturally say: "We had better go in and catch the bull rather "than put off the job."

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[1] [1934] 1 K.B. 126, 138; 50 T.L.R. 55.

[2] (1868) L.R. 3 H.L. 330.

[3] [1947] A.C. 156, 167; 62 T.L.R. 646; [1946] 2 All E.R. 471.

I realize, of course, that Moss and the plaintiff were both at fault. They ought not to have gone into the box at all, because they must have known it was a dangerous thing to do and that they ought not to do it; but their being at fault does not excuse the farmer from his share of the responsibility, if he also was at fault. It is only a ground for reducing the damages. The judge seems to have thought that the case depended entirely on whether the plaintiff acted outside the scope of his employment or not. Indeed, as I read his judgment, he decided against the plaintiff simply on the ground that, when he went in the shed, "he acted "outside the scope of his employment." I do not think this is the right line of approach. An inquiry as to "scope of employ-"ment" is relevant and proper when considering whether a master is liable to a third person for his servant's negligence; but it does not arise when considering a claim by the servant himself for his master's negligence. In any case, if I were asked whether the plaintiff was acting "in the course of his employ-"ment," or was out on a "frolic of his own," as the phrase is, I would answer that by saying that beyond question he was acting in the course of his employment. He was acting for the master's purposes in a matter which concerned his master, and in no way on his own account. Even if he had been told not to go into the box he would not thereby have been taken outside the scope of his employment: *cf. Limpus* v. *London General Omnibus Co.*[4]

In these circumstances I ask myself what the judge meant by saying that the plaintiff "acted outside the scope of his employ-"ment." He probably meant that it was no part of the plaintiff's duty to go into the box. That is true no doubt. But it does not defeat his claim altogether. It is no part of any man's duty to be careless or disobedient; but his carelessness and disobedience does not necessarily defeat his claim altogether. In *Stapley* v. *Gypsum Mines Ld.*[5] it was no part of Stapley's duty to enter the stope. He, like the plaintiff in the present case, did what he must have known was dangerous and that he ought not to do it. Yet the House of Lords held that he was entitled to damages, though the damages were reduced, of course, owing to his own negligence.

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[4] (1862) 1 H. & C. 526.

[5] [1953] A.C. 663; [1953] 2 All E.R. 478.

So also in the present case I think that whatever the plaintiff did wrong goes to contributory negligence, but does not discharge the farmer altogether if he also was negligent.

I may add that the evidence clearly showed that Moss was negligent and the judge said that he was; and if the pleadings had sought to make the farmer liable for Moss's negligence, I do not think that there could have been any answer to it: see *Stapley* v. *Gypsum Mines Ld.*[5]

What, then, is to be done in this case? Inasmuch as the judge misdirected himself about the "scope of employment," I think it plain that there should be at least a new trial. But I do not think that we should put the parties to that expense. The facts were not in dispute. The only question is: what is the proper inference from those facts? I think we should take the responsibility of judging it ourselves, and I should hold that there was a faulty system of work and that the farmer is responsible for it. Further, if there were to be a new trial, the plaintiff would certainly be allowed to amend the pleadings and rely on Moss's negligence to which there could be no answer. In one way or the other, therefore, the farmer is certainly liable. But the plaintiff also was at fault, and I would place the responsibility equally on each. The plaintiff should recover, therefore, half his damages, that is, £1,250.

JENKINS L.J. This is an appeal by the plaintiff from a judgment of Donovan J., dated April 1, 1954, dismissing the plaintiff's action against the defendant for damages for personal injuries sustained by the plaintiff in an attack upon him by a bull, kept by the defendant on a farm where the plaintiff was employed by the defendant as a farm hand. The accident happened on May 11, 1951. The plaintiff had been a farm worker ever since he left school and had been with the defendant for five years. The farm was some 260 acres in extent and the defendant employed upon it some five or six men. The defendant kept on the farm a herd of cows and also the offending bull which he used for stud purposes. The plaintiff was by length of service the senior employee on the farm, but was not in charge of the cattle, which were normally looked after by a fellow employee named Moss, who was the regular "beastman," and had been in the service of the defendant a matter of only four or five months.

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[5] [1953] A.C. 663.

The defendant acquired the bull in or about April, 1950. It showed signs of bad temper in or about October, 1950, when it chased an employee named Featham who was feeding it in the open foal yard. After this episode the bull was kept permanently in a loose box in the walls of which there were (on opposite sides) a window with no glass in it and a half door. At some time after the incarceration of the bull the defendant had the bull de-horned because " it nearly caught him one day." Earlier, when the bull had been let out for the purpose of serving cows, it had been masked, this being a precaution commonly taken with bulls of uncertain temper. It is thus not in doubt that the bull was known to the defendant to be dangerous. In addition to causing the bull to be permanently shut up after it had attacked Featham, the defendant specifically warned two of his men (Benson and Featham) that it was dangerous. According to their evidence he told Benson that the bull was dangerous and that he must not go into the loose box with it; while he told Featham: " Do not go and handle him yourself. Do not go near the bull " yourself," Featham " taking it for granted " that this meant that he was not to go into the loose box with the bull. According to Moss's evidence the defendant also told Moss to be very careful of the bull, and while not definitely telling Moss not to go into the loose box with the bull, said that when Moss had to " muck " out " the box he should try to catch it through the window or through the half door. The defendant said in his evidence that he could not remember specifically warning the plaintiff, and the plaintiff said in his evidence that the defendant did not do so. The plaintiff, however, knew that the bull had attacked Featham, and I think that there can be no doubt that everyone on the farm, including the plaintiff, knew perfectly well that it was dangerous.

Moss's evidence, to the effect that the defendant told him to try to catch the bull through the window must, I think, clearly be taken as referring to the instructions which, according to the defendant's evidence, the defendant, after the attack on Featham, gave to some of his men, to the effect that when it was necessary to " muck out " the loose box they must, before going in, secure the bull from outside by putting a staff with a hook at the end, provided for the purpose, through the window or half door, and passing the hook through a ring in the bull's nose. After catching the bull in this way they were to pass a rope through the ring and make the rope fast to some suitable object (there seem to have been several) outside the loose box, the bull being thus tethered firmly with his head protruding outwards through the window or half door, so that anyone could go into the loose box and "muck it out" in safety.

As regards the warnings and instructions given by the defendant after the attack on Featham the judge thus summarized the effect of the evidence: "After the bull had previously attacked "the farm employee—one Featham—the defendant, as the owner "of the farm and of the bull, told two of his employees that "they must not go into the box while the bull was not tethered. "When the bull needed to be tethered they were to engage the "hooked staff with the ring in the bull's nose while they stood "outside the open window or outside the half door. Once that "was done the bull would be under sufficient control to enable "the man to enter the shed, if necessary, and attach the rope. "Alternatively, the rope would be attached to the ring from "the open window or half door, if the bull could be brought with "the staff within reach. The defendant cannot specifically "remember which two men he told never to go into the shed with "the bull untethered. The plaintiff says that he was not one of "them and the defendant cannot say that he was. Moss, the "beastman, does not remember being so told but simply to be "very careful about the bull. But I am satisfied that the defen- "dant did tell two of his men. He had only four or five altogether "at the time, the farm being a comparatively small one, and the "strong probability is that these instructions became known to "all his employees."

I am not sure that this is entirely accurate. It is clear that two of the employees (Featham and Benson) were specifically warned of the dangerousness of the bull in the terms I have already mentioned, but it does not appear that either of them was told about the use from outside the loose box of the hooked staff, and one of them, Benson, said he was not told anything about that as it was a job he did not do. On the other hand, it is clear from Moss's own evidence that he was instructed as to the use of the hooked staff in this way. There is, however, no reason to qualify the judge's conclusion that "the strong "probability is that these instructions became known to all his "[the defendant's] employees" except by adding that they certainly became known to Moss who was given them by the defendant himself.

It was not always an easy matter to catch the bull by reaching through the window or half door with the hooked staff. The bull's head might be out of reach, or if it was in reach the hook might not engage the ring at the first attempt, in which case the bull (who did not like having the staff poked at his face) might start shaking his head, backing away and generally taking evasive action. To quote Moss's evidence: "if you could not get him "the first time you had had it." On the other hand, the "mucking out" of the loose box was not an urgent operation. It was done at intervals of a month or six weeks when time could conveniently be spared for it; and if the bull could not be caught on a particular occasion there is no apparent reason why the "mucking out" should not have been put off until he was in a more tractable mood. On the day of the accident Moss determined to "muck out" the loose box. He tried to catch the bull from outside by means of the hooked staff, but failed to do so. He then asked the plaintiff to come and help him. It is clear from the evidence that, while the plaintiff was not under Moss's orders, it was well within the scope of the plaintiff's employment to lend a hand with the bull when requested to do so by Moss. The plaintiff went with Moss to the stable. Moss went in and tried to hook the bull with the staff, but without success, the bull shaking his head and backing away. Meantime, the plaintiff stood by the door and kept it open "in case," to quote the plaintiff's own words, "he [i.e. Moss] had to make a dash for it." Moss having failed to catch the bull the plaintiff asked Moss whether he should "have a go." They changed places. Moss stood by the door while the plaintiff took the staff and went and tried to catch the bull. The plaintiff made several attempts, but the bull would not allow itself to be caught, and finally charged the plaintiff and knocked him down against the wall causing serious injuries to his left arm.

The judge, after summarizing in the passage quoted above the effect of the evidence as to the giving of warnings and instructions by the defendant, said: "But I consider the case on the footing "that no express warning to refrain from going into the shed "with the bull untethered reached the plaintiff." He then referred to the knowledge which the plaintiff clearly had about the bull's attack on Featham, its consequent incarceration, its being de-horned, and the previous practice of masking it when let out to service cows, and expressed the conclusion, with which I entirely agree, that "the plaintiff must have known, if he had

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"thought about it at all, that it was dangerous to go into the shed "with the bull untethered inside." Then after describing the way in which the accident took place, the judge expressed in these terms his reasons for dismissing the action: "If it were "part of the plaintiff's duty to go into the box and do as he did, "then there would be no answer to his claim. On the other "hand, if he acted outside the scope of his employment, the "defendant is not answerable. Moss, the beastman, was in "charge of the operation of tethering the bull. He asked the "plaintiff to lend him a hand and the plaintiff agreed. When "Moss made this request and the plaintiff agreed, both were "acting within the scope of their employment by the defendant; "but when Moss opened the door of the shed and went in, I am "satisfied he was doing what he knew he should not do, whether "or not he had been expressly told by the defendant to stay "outside. If the defendant had seen him he would, I have not "the least doubt, have rebuked him and told him to hook the "bull from outside the shed, which though it sounds a chancey "operation, can clearly on the evidence be done, because a bull "is attracted towards an open window or a half door where a "human being is standing. The same remarks apply to the "plaintiff. I think he must have known he should not have gone "into the shed with the bull untethered, or would have realized "that he should not had he given the matter any thought. "Equally, I think the defendant would have stopped him doing "what he did had the defendant seen it. The result is, in my "view, that when the plaintiff went into the shed he acted "outside the scope of his employment. Certainly he was never "told this was part of his duty and, knowing as he did, that the "bull had been put in the shed for the very reason that it was "dangerous, common sense would tell him that he must keep out "until the bull was tethered in the way I have described. Some "time was spent in discussing whether in these circumstances "the doctrine of volenti non fit injuria defeats the plaintiff's "claim. I do not think the case raises that question, for "admittedly there was no agreement, express or implied, between "the plaintiff and the defendant whereby the plaintiff agreed to "run the risk. This is a case where the plaintiff ran the risk, "which was an obvious one, without being asked to do so and in "disobedience if not of instructions about which he knew, at "least of the promptings of ordinary common sense. In other "words, his own lack of reasonable care for himself was the sole "cause of this distressing mishap. The fact that Moss did the "same thing and that he was in charge of the operation, in my "opinion makes the case no better for the plaintiff. I am sorry "to reach this conclusion because the plaintiff acted as he did no "doubt in a desire to help and without thinking much about the "danger involved."

It is contended on behalf of the plaintiff that on the facts as found by the judge he was bound as a matter of law to give judgment in the plaintiff's favour. This contention is one which succeeds but seldom in ordinary cases of negligence. But the present case was not primarily put as an ordinary case of negligence. The particulars of negligence alleged in the statement of claim were these: "(*a*) The defendant well knew that "the said bull was of a fierce and mischievous nature and "accustomed to attack mankind, and was therefore dangerous to "human beings, but he in breach of his duty wrongfully kept "the said bull and failed to keep it under proper control and to "prevent it injuring anyone. (*b*) The said bull, being of the said "nature, should have been kept tethered to a ring in the wall, "or otherwise secured so as to prevent it attacking anyone "entering the box. (*c*) Further, or alternatively, the bull should "have had a length of chain attached to the ring in his nose to "facilitate catching him with a stick as is a usual precaution. "(*d*) Anyone endeavouring to catch the bull was compelled to "enter the said box, which was too small to allow a safe place for "manoeuvre, and exposed such person to unnecessary risk of "being attacked and trapped in the said small space by the bull "as the plaintiff in fact was. (*e*) By reason of the matters "specified in paragraphs (*b*), (*c*) and (*d*) above, the defendant "negligently failed to provide and maintain for the plaintiff a "safe place of work, suitable and safe equipment, a safe system "of work, and proper supervision of the work."

As foreshadowed in the first of these paragraphs of particulars, Mr. Ould, for the plaintiff, seems to have argued his case before the judge, and certainly argued it before us mainly, and indeed almost wholly, upon the ground that this case was within the well-known principle that when a man keeps an animal ferae naturae, and, therefore, of a kind presumed in law to be dangerous, or a domestic animal known to him to be in fact dangerous, he does so at his peril and is liable for any injury caused by the animal to any other person without proof of negligence, unless he can bring himself within one or other of certain recognized exemptions: see *May* v. *Burdett*.[6] Mr. Ould admitted as recognized grounds of exemption (1) contributory negligence—see *Filburn* v. *People's Palace & Aquarium Co. Ld.*,[7] *Marlor* v. *Ball*,[8] though he pointed out that since the Law Reform (Contributory Negligence) Act, 1945, this must be regarded as a ground for reducing damages and not as a complete defence against liability; (2) the principle of volenti non fit injuria, where the party injured by the dangerous animal has freely and voluntarily agreed (either expressly or by necessary implication) to run the risk of such injury; (3) trespass by the injured party, where this was what brought him into contact with the dangerous animal; and (4) act of God. Mr. Ould argued that of these four grounds of exemption none was here available to the defendant but the first, with the result that the plaintiff was entitled to judgment for the amount of damages appropriate to his injuries and their consequences, less whatever proportion (if any) the court might think fit to deduct on account of his contributory negligence.

Speaking for myself, I do not think that this doctrine of absolute liability can reasonably be applied as between a farmer and the persons employed by him on his farm in relation to the handling by those persons of an animal such as a bull kept by the farmer for breeding purposes. Mr. Ould was prepared, in cases of this kind, to accept some relaxation of the strict rule as between the farmer and any person employed by him to look after the bull, on the ground that a person employed for that purpose must be taken to have agreed to run such risks as are necessarily involved in employment of that kind. But he said that the plaintiff here was not employed to look after the bull and was, therefore, in the same position for the purposes of the rule as any stranger lawfully on the farm would have been. I do not think that this last submission accords with the evidence, which, to my mind, shows, as the judge in effect found, that while it was no part of the plaintiff's regular duties to look after the bull, lending a hand with the bull when asked to do so was within the scope of his employment, or, in other words, included amongst the services which he expected, and was expected by the defendant, to render in the course of his employment by the defendant as a farm labourer.

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[6] (1846) 9 Q.B. 101.

[7] (1890) 25 Q.B.D. 258, 260; 6 T.L.R. 402.

[8] (1900) 16 T.L.R. 239.

I cannot, however, regard this as a case for the application of the rule of absolute liability mitigated by an implied agreement to take some degree of risk. I do not think the rule applies at all. This is not the case of a dangerous animal escaping from its place of incarceration or from the control of its keeper and injuring a stranger, the allowing of such an escape being according to modern authority the true basis of the absolute liability: see *Knott* v. *London County Council.*[9] This is a case in which an experienced farm hand went in the course of his employment to assist a fellow employee in one of the normal operations of the farm, namely, the securing of a bull known to be dangerous with a view to cleaning out the loose box in which it was kept. Is it to be held that in such a case the farmer, by whom the man is employed, is, as owner of the bull, under an absolute liability to the man for any injury he may sustain from the bull, however careful the precautions taken by the farmer to enable his men to handle the bull with safety may have been, and whatever degree of disregard for his own safety the injured man may have shown? Considering the large numbers of bulls which must be kept on farms up and down the country, and the high proportion of these which must be manifestly bad-tempered, I think it would be contrary to common sense to hold that the keeping by a farmer of a bad-tempered bull constitutes in itself negligence on his part so as to make him liable to his men for any injury they may sustain in the course of their dealings with the animal, unless indeed the bull has proved itself to be so utterly ferocious and unmanageable that the farmer knows or ought to know that the only way to prevent it injuring the men is to get rid of it. I do not think that the present case can on the evidence fairly be held to be an extreme one of that kind.

In my judgment this case falls to be decided by reference to the ordinary law of negligence as it applies between master and servant. On this footing the duty of the defendant was to take reasonable care to see that the operation of "mucking out" the bull's loose box could be carried out by his men without risk of injury from the bull. The operation could be performed with perfect safety by the method of first securing the bull from outside the box as above described, if that method was one which it was practicable to carry out with the means provided. Apart from negligence based on the rule of absolute liability, the charges of negligence made against the defendant really stand or fall according to the view taken as to the efficacy of the method provided of securing the bull from outside the loose box, and as to the plaintiff's knowledge of the danger of going into the loose box with the bull untethered inside it. If the method provided of securing the bull from outside was a practicable one then there was no need to keep the bull permanently tethered inside the box, for in that case no one in his senses who knew of the danger would think of going in until the bull had been secured by that method. Again, if that method was a practicable one there was no need, from the point of view of safety, to add a chain to the ring, though there might be an advantage from the point of view of saving time. Finally, if that method was a practicable one the charges as to the loose box being too small to allow safe room for manoeuvre and of failure to provide suitable equipment, a safe system of work, and proper supervision break down, given knowledge on the plaintiff's part of the danger of going into the box without first securing the bull from outside.

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[9] [1934] 1 K.B. 126, 138.

The judge held, and I agree, that if it had been part of the plaintiff's duty to go into the box and do as he did, then there would be no answer to the claim. On that assumption the defendant would have been exposing the plaintiff to an unnecessary risk. The judge held, further, that if the plaintiff was acting outside the scope of his employment then the defendant was not liable. This I take to mean "if it was no part of the plaintiff's "duty to act as he did then the defendant was not liable." Taken alone, I think that this proposition is too widely expressed. But the judge went on to hold, in effect, that the method provided was a practicable method of securing the bull from outside, that the plaintiff knew perfectly well that it was dangerous to go into the loose box with the bull untethered inside it, and that he ought not to do so, and, further, that even if he had not been actually instructed to use the method above described his common sense would tell him to keep outside until the bull had been tethered in that way.

It is to my mind a nice question whether on the evidence the method provided of securing the bull from outside the loose box might not have been held to be so slow and uncertain that the defendant should have known that his men would be likely, in their anxiety to get on with their work, to take the risk of going in and attempting to secure the bull inside the loose box. But this was essentially a matter for the judge, who clearly thought that the method provided was adequate. Moreover, that method seems to have been used with success a good many times, and, as I have said before, the "mucking out" of the loose box was not an urgent operation. As to the plaintiff's knowledge of the danger, that again was essentially a matter for the judge, as also was the plaintiff's appreciation, by his own common sense, of the necessity of securing the bull by the method above described before going in, even if he had not been expressly instructed to use that method. In this connexion I would say again that the plaintiff was an experienced farm hand. It was not sought to make the defendant vicariously liable for the negligence of Moss, whom the judge described as "in charge "of the operation," and who plainly flouted express instructions in acting as he did, and might be said to have led or permitted the plaintiff to follow suit. I therefore refrain from expressing any opinion as to how the case might have fared if put in that way.

On the case as presented, and on the judge's findings, I conclude that the appeal must fail. I confess to considerable sympathy for the plaintiff, as he seems to have been a willing servant who met with this great misfortune through excess of zeal. But on any view of the case I think that he could hardly have escaped the attribution to himself of a serious degree of contributory negligence. Be that as it may, I am of opinion that for the reasons I have endeavoured to state this appeal should be dismissed.

MORRIS L.J. The argument advanced on behalf of the plaintiff was that the owner of the bull was under a strict liability and that the plaintiff was entitled to recover damages, though diminished by such extent as might be thought referable to his own negligence. The argument proceeded on the assumption that the mere ownership of a bull which is known to be dangerous involves liability if someone is injured by the bull. But though there is a strict liability which results from owning an animal known to be dangerous it is a liability which is a defined one. The matter was dealt with by Lord Wright in his judgment in this court in *Knott* v. *London County Council.*[10] He was there dealing with the case of a dog which was known to be accustomed to attack mankind. He said[11]: "Once know-"ledge of that propensity is brought home to the keeper of the "dog, he keeps the dog at his peril, so that if it escapes from "his control and attacks and injures any one, he is liable apart

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[10] [1934] 1 K.B. 126.

[11] Ibid. 138.

"from any question of negligence. It is true that it is not "unlawful or wrongful to keep such an animal; the wrong is in "allowing it to escape from the keeper's control with the result "that it does damage. Damage is thus the gist of the action. "A dog under these conditions comes to be classed for this "purpose with beasts naturally savage, such as a lion or tiger. "That such an absolute duty affects the keeper of such an "animal once his knowledge (or what is called the scienter) of "the animal's vice is established, has long been recognized to "be the law. Thus in *Mason* v. *Keeling*,[12] Holt C.J. said of "animals: 'If they are such as are naturally mischievous in "'their kind, he shall answer for hurt done by them without "'any notice; but if they are of tame nature, there must be "'notice of the ill quality.' Dogs fall into the latter category, "and accordingly, in such a case, come within the rule of *Fletcher* "v. *Rylands*,[13] which deals with the strict or absolute liability "for the safe keeping of things which are likely to do mischief "if they escape; if they escape and cause damage the keeper is "prima facie answerable for all the damage which is the natural "consequence of its escape. It is not material to allege or prove "negligence in the defendant—as was held, for instance, with "reference to a monkey, in *May* v. *Burdett*.[14]"

Slesser L.J. expressed himself to the same effect. He said[15]: "The duty of a keeper of a dog who knows it to be dangerous is "an absolute one. In the case of *May* v. *Burdett*[14] it was held "that a person who keeps an animal accustomed to attack and "bite mankind is prima facie liable in an action on the case at "the suit of any person attacked and injured by such animal "without any averment in the declaration of negligence or "default in the securing or taking care of it. The gist of the "action is the failure to control the animal after knowledge of "its mischievous propensities. 'The owner must at his peril "'keep him up safe from doing hurt, for though he use his "'diligence to keep him up, if he escape and do harm the owner "'is liable to answer damages.' (Hale's Pleas of the Crown, "vol. 1, p. 430.) 'The keeper of a ferocious dog, if he knows "'it to be ferocious, is in exactly the same category as the "'keeper of a naturally wild animal.' *Per* Kennedy L.J. in "*Baker* v. *Snell*.[16]"

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[12] (1700) 12 Mod. 332, 335.

[13] L.R. 3 H.L. 330.

[14] (1846) 9 Q.B. 101.

[15] [1934] 1 K.B. 126, 143.

[16] [1908] 2 K.B. 825, 834.

In the present case the bull did not escape. The bull had been at the farm for a little over a year before the plaintiff was injured. It was there for stud purposes. At first the bull was shut up in a shed. Later he was allowed to be in an open foal yard. While there he was masked. One day there was an incident when one of the farm workers was chased by the bull. In consequence of this the bull was immediately placed for custody again in the shed and thereafter remained in the shed and was not ever allowed out of the shed. When the bull was required to service cows they were put with him, and when the shed had to be cleaned out the bull was tethered inside the shed. Having regard to these facts the judge held that " the measures " taken were adequate to prevent the bull from harming anyone " unless that person brought the harm upon himself." Under these circumstances it does not seem to me that this is a case where the " strict liability " resulting from keeping a dangerous animal is made operative. The bull was in a shed from which it could not and did not escape. No harm would have come to the plaintiff had he not gone into the shed and so " brought the " harm upon himself."

The judge has held that when the plaintiff entered the shed he was doing something which he knew he should not do. He was an experienced farm worker. He was 41 years old at the time of his injury and had worked as an agricultural labourer ever since leaving school. He had been working for the defendant for five years. What happened was that Moss, the beastman, asked his help in catching and tethering the bull so that the shed could be cleaned out. The plaintiff's normal duties did not include looking after the bull and he had not previously given any assistance to Moss or been asked to help him, nor had he on any occasion witnessed the catching of the bull when the box had to be cleaned out. The evidence of the defendant showed, however, that the plaintiff acted properly in complying with the request from the beastman for assistance. This is made clear from the following questions and answers: " (Mr. Denny): " Would this be a proper way of putting it? The beastman is " the man in whose charge all the animals are, but he is entitled " to avail himself of the services of other agricultural labourers " to help him as and when he wants it? (A.) Correct. (Q.) That " is the position? (A.) Yes. (Donovan J.): If he said to Rands: " ' Will you give me a hand to tie up this bull,' that would be " quite proper? (A.) Yes. (Mr. Denny): Rands would not take "orders from him but it would be perfectly proper to comply "with a request of that kind? (A.) Yes."

The judge found, therefore, as follows: "He asked the "plaintiff to lend him a hand and the plaintiff agreed. When "Moss made this request and the plaintiff agreed, both were "acting within the scope of their employment." The judge proceeded to hold that the method adopted by Moss and by the plaintiff was one that they both knew that they should not pursue. They did not use the hooked staff while standing outside, either by the open window or by the half-door, but what they did was to enter the shed and to seek by the use of the hooked staff to engage the ring in the bull's nose while inside the shed. Moss tried first. He went in and the plaintiff took up a station at the door and kept the door open for him "in case he had to make a "dash for it." When Moss failed the plaintiff offered to try and they changed places. The plaintiff went into the shed and there received his injuries. As to Moss, the judge held that in going inside the shed he "was doing what he knew he should "not do, whether or not he had been expressly told by the "defendant to stay outside." As to the plaintiff, the judge held that "he must have known he should not have gone into the "shed with the bull untethered or would have realized that he "should not had he given the matter any thought."

For the reasons I have set out I do not consider that there was any failure on the part of the defendant in regard to his strict obligation to prevent the bull from escaping. It may well be that if someone is employed as the custodian of a bull with dangerous propensities he voluntarily accepts such risks as are involved in such employment. On the facts of this case this aspect need not be further considered, and in any event one so employed would not be accepting the risks or the consequences of negligence on the part of his employers. There was a claim pleaded against the defendant on the alternative basis of negligence. The alleged negligence was particularized. The fact that the judge does not deal in terms with each and every allegation of negligence may denote that during the hearing there was a measure of concentration, as indeed there was in the hearing in this court, on the submission that the defendant could not escape from a liability that was strict. But even in the absence of positively expressed conclusions in regard to some of the particulars of negligence, the judge has, I think, absolved the defendant; for it seems to me to be implicit in the judgment that no act done by the defendant, nor any omission by the defendant, constituted a cause of the plaintiff's injuries. The case is a sad one, for the plaintiff was a keen man who "acted "as he did in a desire to help." But the judge felt obliged to form the conclusion that the plaintiff "must have known he "should not have gone into the shed with the bull untethered "or would have realized that he should not had he given the "matter any thought."

The judge said: "The result is in my view that when the "plaintiff went into the shed he acted outside the scope of his "employment. Certainly he was never told this was part of "his duty and knowing as he did that the bull had been put in "the shed for the very reason that it was dangerous, common "sense would tell him that he must keep out until the bull was "tethered in the way I have described." I think that it is not necessary to say that in going into the shed the plaintiff acted outside the scope of his employment, but I think that it is clear what the judge was holding. He found that though the plaintiff had not previously assisted with the bull he was within the scope of his employment in assisting, but that though the defendant had not in terms told the plaintiff not to go inside the box where the bull was, such instruction was not necessary since in the case of the plaintiff the promptings of ordinary common sense would tell him that he should not enter.

Had the plaintiff been required to go into the box he would have been required to run an unnecessary risk and his employer would have been liable. He was not so required. He was entitled to comply with a request to help, but unhappily, in helping, he did something which he knew he should not do. In these circumstances the judge held that "his own lack of "reasonable care for himself was the sole cause of this distressing mishap." This seems to dispose of any suggestion that the defendant was in any way responsible and made it unnecessary to decide whether any of the criticisms of the defendant's methods were valid.

The particulars of negligence can, however, be examined. The first was as follows: "(*a*) The defendant well knew that "the said bull was of a fierce and mischievous nature and "accustomed to attack mankind, and was therefore dangerous "to human beings, but he in breach of his duty wrongfully kept "the said bull and failed to keep it under proper control and to "prevent it injuring anyone." But there was no negligence in merely keeping the bull, and the judge has held that it was kept under proper control. The next was: "(*b*) The said bull, being

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"of the said nature, should have been kept tethered to a ring "in the wall, or otherwise secured, so as to prevent it attacking "anyone entering the box." I doubt whether it would be held that a bull which is in a shed ought to be kept permanently tethered to a ring in the wall; but in any event the judge has held that the plaintiff knew that he ought not to enter the shed.

The next was: "(*c*) Further, or alternatively, the bull should "have had a length of chain attached to the ring in his nose, to "facilitate catching him with a stick, as is a usual precaution." Again I doubt whether a failure to have such a length of chain would be negligent, but whether this be so or not, it seems to me on the findings of the judge that any such failure was not a cause of the accident. Then "(*d*) Anyone endeavouring to catch "the bull was compelled to enter the said box, which was too "small to allow a safe place for manoeuvre, and exposed such "person to unnecessary risk of being attacked and trapped in "the said small space by the bull, as the plaintiff in fact was." The judge has negatived the view that there was compulsion to enter the shed. The last was: "(*e*) By reason of the matters "specified in paragraphs (*b*), (*c*) and (*d*) above, the defendant "negligently failed to provide and maintain for the plaintiff a "safe place of work, suitable and safe equipment, a safe system "of work, and proper supervision of the work." The findings point, however, to the conclusion that the plaintiff did not meet with his accident by doing anything that he was required to do or by following any system of work but on the contrary because most regrettably he did something in a way which he knew was irregular and unauthorized.

It is grievous to think that the plaintiff should have sustained so distressing an injury while showing the zeal of a willing man, but in considering whether the defendant is liable either wholly or in part to compensate the plaintiff I am driven to the view that on the findings of fact of the judge no case of legal liability was established and that there are no reasons why a further hearing should be ordered.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Devonshire & Co., for Pearlman & Rosen, Hull; Dawson, Loncaster & Co.*

A. W. G.

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Lord Goddard C.J., Hodson and Romer L.JJ.

Master and Servant—Employment of servant of another—Continuation after notice—Servant unwilling to return—Action by original employer—Damage a necessary ingredient.

It is an actionable wrong to continue to employ the servant of another person after notice of the earlier employment, although the second employer did not procure the servant to leave his original employment or know, when he engaged him, that he was the servant of another; but an action can only be maintained by the first employer against the second if the former has suffered damage by reason of the retention of the servant in his employment by the second employer.

Where, therefore, the defendant, not having enticed the plaintiffs' servant from his employment, continued to employ him after notice of his contract with the plaintiffs, but it was established that in no circumstances would the servant have returned to the plaintiffs' employment:—

Held, that although the servant remained liable to the plaintiffs for the breach of his contract of employment with them, no action was maintainable by the plaintiffs against the defendant since the action of the latter in retaining the servant in his employment caused no damage to his original masters, and the case, therefore, was one of damnum sine injuria.

Bird v. *Randall* (1762) 3 Burr. 1345 applied.

Blake v. *Lanyon* (1795) 6 Term Rep. 221 explained.

Per curiam, the misconception in the present case has perhaps arisen from the fact that it is said that in this class of case the defendant must act maliciously. For this purpose, maliciously means no more than knowingly.

Decision of Hallett J. affirmed on different grounds.

APPEAL by the plaintiffs from Hallett J. sitting at Norfolk Assizes.

The plaintiffs, who carried on a restaurant and a fried fish bar at Hunstanton, Norfolk, brought an action against the defendant, William Alfred Reuben Stevens, who was the proprietor of the Glebe Hotel in the same town for wrongfully enticing two servants of the plaintiffs, William Nicholson, a fish frier, and Terence Mickelburgh, a waiter, to break their contract of service with the plaintiffs, and for harbouring them by taking them into, and keeping them in his employment when he knew that they had broken their contract of service with the plaintiffs.

Hallett J. held that there was no evidence that the defendant enticed or procured the servants to break their contract, and

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against that finding there was no appeal. With regard to Mickelburgh, the second employee concerned, the plaintiffs attached no value to his services, as he was easily and promptly replaced, and the appeal related only to the case of Nicholson, with regard to which Hallett J. held that on the facts as proved before him the defendant honestly believed that he was at liberty to employ the plaintiffs' servant and, accordingly, that the plaintiffs had no cause of action against the defendant for harbouring the servant after notice that he had broken his contract with the plaintiffs. He therefore gave judgment for the defendant.

The plaintiffs appealed. The material facts are stated in detail in the judgment of the court.

J. B. Elton and *M. C. Parker* for the plaintiffs. Hilbery J. was wrong in holding that the defendant had not harboured the plaintiffs' servant, but it is not sought to reverse his decision that the defendant did not entice the servant to leave the plaintiffs' employment. A person harbours the servant of another if he employs the servant knowing that he is under contract to another person, or if he engages the servant without knowing that he is employed and, after having been given notice of the servant's existing employment, continues to keep him in his employment. That is what occurred in the present case, since it is clear on the facts that, after he had provisionally engaged the servant, the defendant was informed both verbally and by letter of the servant's existing contract. That being so, the plaintiffs were entitled to damages. The law is correctly stated in *Blake* v. *Lanyon*,[1] in which the marginal note is: "An action will lie for "continuing to employ the servant of another after notice, though "the person so continuing to employ the servant did not procure "him to leave his master or know when he employed him that he "was the servant of another." That exactly represents the state of affairs in the present case. *Blake* v. *Lanyon* [1] was followed in *De Francesco* v. *Barnum*,[2] and both those decisions were followed in *Fred Wilkins & Brothers Ld.* v. *Weaver*.[3] In arriving at his decision Hallett J. relied to some extent on *British Industrial Plastics Ld.* v. *Ferguson* [4] as supporting his view that the honest belief of the defendant that he was entitled to employ the plaintiffs' servant afforded a defence, but it is submitted that, when carefully examined, that case has no application to the

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[1] (1793) 6 Term Rep. 221.

[2] (1890) 63 L.T. 514; 6 T.L.R. 486.

[3] [1915] 2 Ch. 322.

[4] [1940] 1 All E.R. 479.

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present case. In conclusion, it is submitted that as the defendant here had verbal notice from the plaintiffs on the evening of August 6 when their servant was provisionally engaged, and also by letter on August 7 when he began to work for the defendant that he was in their employment, the defendant violated the legal right of the plaintiffs by continuing to employ him. That gave the plaintiffs a good cause of action entitling them to recover the £30 at which sum Hallett J. had provisionally assessed the plaintiffs' damages. [The observations of Jenkins and Morris L.JJ. in *D. C. Thomson & Co. Ld.* v. *Deakin* [5] were also referred to.]

Viscount Hailsham Q.C. and *C. Bülow* for the defendant. Hallett J. rightly dismissed the plaintiffs' claim on the facts before him. The authorities show clearly that an action for enticing or harbouring a servant is one in which good or bad faith is the most important element, and Hallett J. was right in so regarding it and in holding that as the defendant acted honestly, though in a muddleheaded manner, the plaintiffs' claim must be dismissed. To establish bad faith on the part of the defendant it was necessary to show, not only that he had been told but that he actually knew, that the course of conduct on which he was embarking was inconsistent with a contract of the existence of which he knew. On Hallett J.'s findings of fact he was bound to give judgment for the defendant. Both the actions for enticing and for harbouring are examples of actions per quod servitium amisit, and in the present case the facts expressly negatived the view that the plaintiffs had suffered any damage as the result of the defendant's act—for it was clearly established that the servant concerned would never have gone back to the service of the plaintiffs in any circumstances—therefore the act of the defendant did not cause the plaintiffs any damage, which is an essential element of their claim. The ingredients of the actions for enticing and harbouring are set out in Bullen and Leake, 3rd ed., p. 359, and in footnote (*a*) on the same page, and it is clear that unless the services of the servant were lost to the plaintiffs "per quod" the act of the defendant there is no damnum and no injuria to the plaintiffs. Hallett J. was right in the view he took of *British Industrial Plastics Ld.* v. *Ferguson*,[6] which presents almost an exact analogy to the present case, and his judgment in favour of the defendant should be affirmed. [Reference was also made to *Eager* v. *Grimwood*.[7]]

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[5] [1952] Ch. 646; [1952] 2 T.L.R. 105; [1952] 2 All E.R. 361.

[6] [1940] 1 All E.R. 479.

[7] (1847) 1 Ex. 61.

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Parker, in reply, referred to *Sykes* v. *Dixon*[8] and *Forbes* v. *Cochrane*.[9]

November 19. LORD GODDARD C.J. read the judgment of the court, which after stating the nature of the action, continued: We will state as succinctly as we can the relevant facts which appear to have been found by Hallett J. in the course of a very long and careful if somewhat discursive judgment.

The plaintiff company have a business at Hunstanton and carry on a restaurant and also a fried fish bar. The defendant is an hotel proprietor in the same town and the engagement of servants for the hotel is undertaken by his wife on his behalf. On July 22, 1952, the plaintiffs' director engaged Nicholson as a fish frier, and apparently it is not easy in these days to get a competent man for this particular work. He was engaged by the week though, no doubt, the plaintiffs hoped that he would stay in their service for the summer season. His wages were £8 10s. a week. He entered on his service and stayed there till August 6, 1952. At 11 a.m. on that day Nicholson asked if he could go out for a short time. On getting permission, he went to the defendant's hotel and applied to the defendant's wife for the job of assistant chef. She agreed to engage him and he was to start work on the following morning at a wage of £7 a week. This was later made subject to his obtaining the permission of the labour exchange under the Notification of Vacancies Order, 1952. Considering that his new wage was 30s. less than he was paid by the plaintiffs, it is clear, as the judge held, that Nicholson certainly did not intend to return to the plaintiffs' service. In fact, however, he did return that afternoon because in the hurry of leaving he had left his watch behind; he went back and got his watch and worked till closing time that day, but that evening, without a word to the plaintiffs, he finally took himself off about 6 p.m. He obtained from the labour exchange a permit to enter the defendant's service and, on producing that to the defendant's wife the next day, he entered on his work at the hotel as assistant chef.

About 6.30 on the previous day, Myers, the plaintiffs' director, having discovered what was afoot, went to the defendant's hotel and told him that Nicholson was in the plaintiffs' service and protested against the defendant taking him on, and followed this up by sending a letter to a like effect which was delivered the next morning before Nicholson presented himself for work. So there is no doubt that when the defendant retained Nicholson in his service he had notice that Nicholson had broken his contract with the plaintiffs.

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[8] (1839) 9 A. & E. 693.

[9] (1824) 3 B. & C. 448.

The defendant and his wife appear to have been under the belief, and, as the judge found, the bona fide belief, that as Nicholson had the permission of the labour exchange to enter their employment that was all that mattered and that notwithstanding the notice they had received from Myers they were free to employ him. That, of course, was an entire misconception, and it is not contended that the labour exchange officials had any power to authorize or excuse a breach of contract on Nicholson's part. But we understand from his judgment that Hallett J. held that as the defendant held this honest belief he could not be said to have maliciously harboured the plaintiffs' servant, and it was on that ground that he gave judgment for the defendant. While, as will be seen, we are of opinion that in the result the judgment was right, we cannot agree with the view of the judge on this point.

There can be no question, subject to what we have to say about proof of damage, that it is actionable to continue to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master or know when he engaged him that he was the servant of another. We are quoting the perfectly accurate marginal note to *Blake* v. *Lanyon*.[1] This case has frequently been recognized and followed and we need only quote *De Francesco* v. *Barnum* [2] and *Fred Wilkins & Brothers Ld.* v. *Weaver*.[3] In *D. C. Thomson & Co. Ld.* v. *Deakin*,[4] the doctrine was distinctly asserted in this court, see especially *per* Jenkins L.J.[5] It is now established beyond controversy that the violation of a legal right committed knowingly is a cause of action if damage is caused thereby: see *Lumley* v. *Gye*,[6] *Quinn* v. *Leathem*,[7] *Best* v. *Samuel Fox & Co. Ld.*[8] A person who violates the right of another cannot be heard to say that he believed that he was acting lawfully or that he did not understand that he was violating a right.

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[1] (1795) 6 Term Rep. 221.

[2] (1890) 63 L.T. 514; 6 T.L.R. 486.

[3] [1915] 2 Ch. 322.

[4] [1952] Ch. 646; [1952] 2 T.L.R. 105; [1952] 2 All E.R. 361.

[5] [1952] Ch. 694.

[6] (1853) 2 E. & B. 216.

[7] [1901] A.C. 495; 17 T.L.R. 749.

[8] [1952] A.C. 716, 729; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

The misconception in the present case has perhaps arisen from the fact that it is said that in this class of case the defendant must act maliciously. For this purpose maliciously means no more than knowingly. This was distinctly laid down in *Lumley* v. *Gye*,[9] where Crompton J. said that it was clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation of master and servant by harbouring and keeping the servant after he has quitted his master during his period of service commits a wrongful act for which he is responsible in law. Malice in law means the doing of a wrongful act intentionally without just cause or excuse: *Bromage* v. *Prosser*.[10] "Intentionally" refers to the doing of the act; it does not mean that the defendant meant to be spiteful, though sometimes, as, for instance, to rebut a plea of privilege in defamation, malice in fact has to be proved.

In holding that acting under a bona fide belief afforded a defence, Hallett J. relied on *British Industrial Plastics Ld.* v. *Ferguson*,[11] a decision of the House of Lords. In that case the defendants were approached by a former servant of the plaintiffs who offered them a secret process which he was under contract with the plaintiffs not to disclose. Though the defendants at first suspected that the process was the property of the plaintiffs, they sent the matter to patent agents, and hearing from them that the process was patentable they foolishly, but honestly, thought that the servant could lawfully offer it to them. It was held that this honest belief afforded a defence. But the essential difference between that case and this is that the defendants there were never warned by, or had any notice from, the plaintiffs that they owned the process. Accordingly, it was held that they did not act maliciously because they had not the requisite knowledge. The question of bona fides was material on the question whether the defendants had deliberately shut their eyes to the obvious. Had they done so, it would have been equivalent to knowledge, but as they had only acted in a muddleheaded manner, but not dishonestly, knowledge was not to be imputed to them. Properly understood, that case has no application to the present.

Hallett J. held that the defendant in the present case was under the honest belief, in spite of the notice he had received, that Nicholson was free to be employed by him, apparently mainly, at any rate, because of the permit from the labour exchange, and accordingly he did not consider whether damage or injury was necessary to support the action. He found as a fact, and this court agrees with him, that clearly Nicholson would not have gone back to the plaintiffs' service whether the defendant continued to employ him or not. Although Nicholson was not called, his actions speak for themselves on this matter, and the inference that he would not return was, on the facts, abundantly justified. He accepted the job at the defendant's hotel at a wage less than the plaintiffs were paying him and twice took himself off, or to use the common expression in such cases, walked out on the plaintiffs. If, therefore, he would not have returned to them, how can it be said that they suffered any damage because the defendant employed him? The question then is, is this a case of damnum sine injuria or, as the legal right of the plaintiffs was violated, must injury or damage be presumed? A short way of stating the problem is, does the action lie in trespass or in case? It is curious, but none the less the fact, that this point has never been discussed in the more recent of the cases to which we have referred, though it did arise in *Blake* v. *Lanyon*,[12] and it is the decision in that case which causes the difficulty. The report states that on getting notice of the former service, the defendant requested the servant to return to his master and finish his work, and when he refused to do so the defendant continued to employ him. The court said that "a person who contracts with another "to do certain work for him is the servant of that other till the "work is finished and no other person can employ such servant "to the prejudice of the first master: the very act of giving him "employment is affording him the means of keeping him out of "his former service." Now, there is no doubt, as appears from the cases already cited, that the violation of a legal right is a ground of action provided it causes injury or damage. Nowhere does this appear more clearly than in Lord Lindley's speech in *Quinn* v. *Leathem*.[13] True, the damage need not be pecuniary; in the famous case of *Ashby* v. *White*,[14] Holt C.J. put it thus [15]: "My brother Powell indeed thinks, that an action upon the case "is not maintainable, because there is no hurt or damage to "the plaintiff; but surely every injury imports a damage, though "it does not cost the party one farthing, and it is impossible "to prove the contrary; for a damage is not merely pecuniary, "but an injury imports a damage, when a man is thereby

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[9] 2 E. & B. 216.

[10] (1825) 1 C. & P. 673.

[11] [1940] 1 All E.R. 479.

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[12] 6 Term Rep. 221.

[13] [1901] A.C. 495.

[14] (1703) 1 Smith's L.C., 13th ed., 253.

[15] Ibid. 274.

"hindered of his right." There, it will be remembered, the action was brought against a returning officer for refusing to allow the plaintiff to vote. That was the injury; he was deprived of his vote and damages were therefore at large. What, then, is the explanation of the view which the court took in *Blake* v. *Lanyon?*[16] The explanation is, we think, this: in the eighteenth and, indeed, into the next century the relation of master and servant differed in material respects from that which obtains today. Ever since the Statute of Labourers, passed in 1359, an artificer or labourer or person of that degree was bound to work for any person willing to employ him. If he refused to do so he became a vagrant, a masterless man was the expression sometimes used. He was liable to be dealt with by the justices and subject to penalties, probably the least of which was being set in the stocks. Not only was the statute unrepealed till the Statute Law Revision Act, 1863, but it was confirmed, amended, extended and modified by a whole series of Acts, notably by 5 Eliz. 1, c. 4, passed in 1562 and not repealed till 1875. We do not propose to burden this judgment by setting them out; they and their main provisions will be found in Volume 3 of Stephens' History of the Criminal Law, at pp. 202–6, and the powers of justices and the punishments at pp. 266–73. If, therefore, the defendant Lanyon had, on receiving notice from Blake, discharged the servant he would have had to return to Blake's service or suffer the penalties for refusing work which was offered. The court could therefore easily infer that had the defendant discharged him he would have returned to the plaintiff's service, so the continuance of the harbouring did injure the plaintiff. Ideas which had come down from the days of serfdom and villeinage lingered on, so that a master was regarded as having a proprietary right in his servant. An act per quod servitium amisit violated his proprietary right. Another species of the same action was that for crim. con.; a husband had, in the eye of the old law, a certain proprietary right in his wife; *cf.* Bracton De Legibus Angliae (Twiss's ed., vol. 2, p. 547), Blackstone (1778), 8th ed., vol. 3, chap. 8, p. 139. So firmly fixed was this idea of a proprietary right both in a wife and a servant that it appears that pleaders were accustomed to lay the action of crim. con. or of depriving one of the services of a servant either in trespass or in case: see *Ditcham* v. *Bond.*[17] The wrong to the husband or master was regarded as direct and not consequential.

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[16] 6 Term Rep. 221.

[17] (1814) 2 M. & S. 436.

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But that the action lay in case there is no doubt, and now that the idea of a proprietary right can no longer persist it is an action on the case pure and simple. Ever since *Mary's Case* [18] it is essential that the master should have sustained some damage, and the matter is really put beyond controversy by *Bird* v. *Randall.*[19] There, Lord Mansfield, delivering the judgment of the King's Bench, held that where a servant had paid his master the penalty stipulated for leaving him in breach of his articles, no action would lie by the master for the seduction of the servant. No doubt at the present day if a servant, domestic or otherwise, breaks his contract of service he or she may put his employer to the greatest inconvenience and may cause him actual pecuniary loss. For so doing the servant is liable to an action for damages, and if a third party has enticed or procured the breach, he too is liable. But if, not having enticed the breach, a person employs that servant who would not in any case have returned to the first employer, while the servant remains liable the second employer is not, for his action has caused no injury to the original master.

For this reason, though different from that on which Hallett J. decided the case, we are of opinion that the appeal fails and is dismissed with costs.

Appeal dismissed.

Solicitors: *Stuart C. Myers; Metcalfe, Copeman & Pettefar.*

P. B. D.

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[18] (1612) 9 Co.Rep. 111*b*, 201.

[19] (1762) 3 Burr. 1345.

RAJBENBACK *v.* MAMON.

1954 *Dec.* 2, 3, 7.

Wynn-Parry J. (sitting as an additional judge of the Queen's Bench Division).

[1954 R. No. 1920.]

Landlord and Tenant—Rent restriction—Public policy—Mutuality—Promise by tenant to give up possession—Promise by landlord to give valuable consideration—Whether agreement enforceable by landlord.

Contract—Consideration. Public policy.

The tenant of a rent restricted flat agreed in May, 1954, with his landlord that if he should give up possession of the flat on or before the end of 1954 he should be entitled to be paid £300 by the landlord on so doing.

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On the landlord later repudiating this agreement, the tenant brought an action claiming a declaration in accordance with its terms. It was contended for the defendant that the agreement was void and unenforceable on the grounds of public policy and want of mutuality, and as being an attempt to contract out of the Rent Acts:—

Held, that the plaintiff was entitled to the declaration sought, as the agreement was not void either on the ground of public policy, or of want of mutuality, or as an attempt to contract out of the Rent Acts.

Barton v. *Fincham* [1921] 2 K.B. 291; 37 T.L.R. 386 distinguished.

ACTION.

The plaintiff was the tenant of a flat, of which the defendant was the landlord. The flat was subject to the Rent Restriction Acts. In May, 1954, an oral agreement was made between the plaintiff and the defendant (as set out in the statement of claim) "that the plaintiff would vacate the said flat at the end of the "year 1954 and that in the event of his so doing and in con"sideration thereof the defendant would pay to the plaintiff the "sum of £300."

The plaintiff always intended to vacate the flat at the end of the year, but the defendant later denied the existence of the agreement and sought to repudiate it. The plaintiff brought an action in which he claimed a declaration "that in the event of his "delivering up to the defendant vacant possession of the flat on "or before January 1, 1955, he should be entitled to payment "from the defendant on that date of the sum of £300."

Montague Waters for the plaintiff. The decision in *Barton* v. *Fincham* [1] is no authority for the proposition that the agreement in suit is either contrary to public policy or otherwise void. The Court of Appeal in that case decided that by reason of section 1 (5) of the Rent Act of 1920 the jurisdiction of the court to make an order for possession against a protected tenant was limited, and that the parties themselves could not by contract circumvent that statutory limitation and confer on the court a jurisdiction inconsistent with the subsection. In so far as the question of public policy was discussed in the judgments in the Divisional Court in that case, the discussion was obiter and inconclusive.

The fact that the present contract lacks mutuality is no reason for holding that it is against public policy to enforce it. There is much to be said for the view that it is in the interest of landlords and tenants alike that they should be able to come to an agreement regarding the delivery up of possession of controlled premises, and that such an agreement should be enforceable in all respects by the tenant. Agreements of this nature are not in all respects unenforceable by the landlord, and *Barton* v. *Fincham* [2] did not so decide. Numerous examples could be given of cases where the tenant might leave the premises pursuant to such a contract, but might commit some other breach of its terms. In such a case the landlord could obtain damages for the breach.

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[1] [1921] 2 K.B. 291; 37 T.L.R. 386.

Desmond Ackner for the defendant. The consideration moving to the defendant was the plaintiff's promise to give up possession within a given period. It is clear from the cases that the plaintiff's promise was unenforceable by the defendant: *Barton* v. *Fincham* [3]; *Brown* v. *Draper* [4]; *Middleton* v. *T. W. Baldock* [5]; *R. M. R. Housing Society Ld.* v. *Combs.*[6] The defendant could not obtain a declaration from the court that on his offering to pay or paying to the plaintiff at the end of 1954 the sum of £300, he would be entitled to occupation of the flat now occupied by the plaintiff.

The plaintiff's promise being unenforceable, it could not be a valid consideration in law for the defendant's promise; there was a clear lack of mutuality, and therefore no contract between the parties. The position in law was, therefore, that the defendant's so-called promise amounted to an offer which could only be turned into a contract, not by the plaintiff's promise to go, which was unenforceable, but by his actually going out at some time within the stipulated period and prior to the offer being withdrawn. There could only be acceptance of the defendant's offer by the plaintiff leaving the premises. Until this occurred there was no contract, but merely a continuing offer.

WYNN-PARRY J., after reviewing the evidence: On the question of fact which was raised by this action, I find as a fact that the agreement alleged in the statement of claim is established.

There remains a point of law which was taken by Mr. Ackner on behalf of the defendant. I allowed him to add a paragraph to

[2] [1921] 2 K.B. 291.

[3] Ibid.

[4] [1944] K.B. 309; 60 T.L.R. 219; [1944] 1 All E.R. 246.

[5] [1950] 1 K.B. 657; 66 T.L.R. (Pt. 1) 650; [1950] 1 All E.R. 708.

[6] [1951] 1 K.B. 486; [1951] 1 T.L.R. 1; [1951] 1 All E.R. 16.

the defence to this effect: "The alleged agreement was an "attempt by the parties to contract out of the Rent Acts, 1920 "to 1939, and is therefore void and unenforceable," and for that purpose he relied upon the well-known case of *Barton* v. *Fincham.*[1] That case, as I understand it, does no more than this: it gives effect to the limitation on the jurisdiction of the court to make an order for possession which was imposed originally by subsection (5) of section 1 of the Act of 1920, and it does nothing more. It does not discuss the question of public policy or any of the other questions which appear to have been raised before the Divisional Court before the case reached the Court of Appeal.

The agreement here is quite clearly an agreement composed of promise for promise, and the attack which was developed on that agreement is that there is want of mutuality; because it is quite clear on the authority of *Barton* v. *Fincham* [2] that although the plaintiff had agreed as part of the agreement to leave the premises at the latest by December 31 next, he could not be compelled to do so at the suit of the defendant, because the defendant could not obtain an order for possession. On the other hand, there is no doubt that if the plaintiff (as he intends) does go out on December 31 next, the defendant will obtain all that he sought by the agreement which I find he made; namely, he will get vacant possession, which, according to his own evidence, has been part of his policy as regards all flats, as his object is either to let them furnished or to obtain the benefit of the recent Act by which, if he puts them in a good state of repair, he will be able to obtain enhanced rents on letting them. I can see no authority—certainly no authority which has been cited to me—which suggests that an agreement such as this is in any way against public policy; nor do I think that it is an agreement which must be treated as void and of no effect for want of mutuality. Ordinarily in a contract there would be mutuality, but many examples (if necessary) can be given where Parliament has stepped in and, to some extent, robbed a contract of some degree of mutuality without destroying it, and I think that this is one of those contracts.

I can find no reason, at any rate in the state of the authorities as they have been cited to me, for holding that this agreement is in any degree vitiated by the effect of the Rent Acts. It was argued that in reality there was no agreement, there was only a continuing offer—and presumably one which could be brought to an end at any time by the defendant—which, if accepted by the plaintiff by going out of possession on December 31, might result in the defendant becoming liable to pay £300. All I need say on that is that the evidence is quite against it. There is clearly here an agreement containing promise for promise, and on the view I take of the authorities as they have been cited to me there is nothing to make that agreement unenforceable.

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[1] [1921] 2 K.B. 291; 37 T.L.R. 386.

[2] Ibid.

In the result I propose to make a declaration that in the event of the plaintiff delivering up to the defendant vacant possession of the flat on or before January 1, 1955, he will be entitled to payment from the defendant on January 1 of the sum of £300.

Declaration accordingly.

Solicitors: *Cyril Ralton & Co.; Stanley Attenborough & Co.*

F. R. D.

REGINA *v.* JUDGE FRASER HARRISON.
Ex parte THE LAW SOCIETY.

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Jan. 13.

Lord Goddard C.J., Cassels and Sellers JJ.

Legal Aid—Costs—Charge on property recovered—Plaintiff legally aided —Nil contribution—Compromise of action—£500 paid into court for plaintiff by defendants—No order as to costs—Whether £500 subject to charge for benefit of legal aid fund—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 3 (4).

An action, brought by a legally assisted infant plaintiff, whose contribution was assessed at nil, was settled, the defendant agreeing to pay £500, no order being made as to the plaintiff's costs. That sum, having been paid into court, was transferred to the county court to be applied for the benefit of the plaintiff. The Law Society applied to the county court under section 3 (4) of the Legal Aid and Advice Act, 1949, for payment out from that sum of an amount equal to the costs paid from the legal aid fund on the plaintiff's account. The county court judge refused to make an order. On an application for an order of mandamus:—

Held, that section 3 (4) applied not only to a case where there was a difference between the amount of contribution and the costs incurred, but also to one where there was no contribution, and, therefore, the legal aid fund should be reimbursed from the damages recovered by the plaintiff.

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APPLICATION for an order of mandamus.

On June 17, 1953, an action before Glyn-Jones J. at Liverpool Assizes—*Jones* v. *Ferro-Concrete (Lancashire) Ld.*—in which an infant plaintiff sued by his father as next friend, was settled, the defendants undertaking to pay into court the sum of £500, which by order of the court was transferred to the Liverpool County Court to be applied for the benefit of the infant plaintiff. No order was made for payment by the defendants of any costs. The plaintiff was legally aided and his contribution was assessed at nil. On June 15, 1954, the Law Society's No. 7 (North Western) Legal Aid Area applied to the Liverpool County Court for payment out of the sum in court of £134 14s. 9d. to the Law Society, that being the amount paid out of the legal aid fund on the plaintiff's account to solicitors and counsel, it being alleged that such sum was a first charge for the benefit of the legal aid fund on the sum in court pursuant to section 3 (4) of the Legal Aid and Advice Act, 1949.[1] Judge Fraser Harrison refused to make the order on the ground that, when approving the settlement, Glyn-Jones J. had said: "I gather that the defendants "have not offered to pay you any costs. We must leave the "legal aid fund to deal with the next friend." The Law Society applied for an order of mandamus.

Gerald Gardiner Q.C. and *J. S. Watson* for the applicants. The trial judge did not mean his remarks to be acted upon. They did not form part of the order. It was the intention of the legislature that, if an assisted person won, the public should not be put to expense especially if there was no contribution. Here the infant plaintiff had recovered £500, and the fact that his contribution was nil was no reason why the sum should not be subject to a charge for the benefit of the legal aid fund.

The respondent did not appear and was not represented.

LORD GODDARD C.J. In this case Mr. Gardiner moves on behalf of The Law Society for an order of mandamus to Judge Fraser Harrison, of Liverpool County Court, that he should

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[1] Legal Aid and Advice Act, 1949, s. 3 (4): "Except so far as regulations otherwise provide, any sums "remaining unpaid on account of a "person's contribution to the legal "aid fund in respect of any proceedings and, if the total contribution is less than the net liability of "that fund on his account, a sum "equal to the deficiency shall be a "first charge for the benefit of the "legal aid fund on any property "(wherever situate) which is recovered or preserved for him in the "proceedings."

"make an order for payment out of the fund in court of the sum "of £134 14s. 9d. to The Law Society's No. 7 (North Western) "Legal Aid Area," on account of the plaintiff in the action of *Jones* v. *Ferro-Concrete (Lancashire) Ld.*

The matter arises in this way: The action was brought by an infant acting through his next friend. The Law Society Legal Aid Area Committee issued a certificate to the infant to bring the action through his next friend and assessed the contribution at nil. The action was tried before Glyn-Jones J. and during the course of the action a settlement was arrived at, the judge being of opinion that the infant had no case and if the case had gone on he would have had to find in favour of the defendants. The defendants were willing to pay a sum of money and they offered £250, but they increased it to £500, and the judge apparently said that he regarded that as an ex gratia payment. He said nothing about costs. There is no question but that the settlement was approved by the judge and the judgment of the court was drawn up and is before this court. It reads: "Upon hearing counsel on "both sides, and terms having been agreed between the parties "and approved by the court and upon the defendants' undertaking to pay into court the sum of £500 within twenty-one "days from the date hereof, it is ordered that upon such payment "into court being made all further proceedings herein be stayed, "and that such sum be transferred to the Liverpool County Court "there to be invested applied or otherwise dealt with for the "benefit of the said infant plaintiff in such manner as the said "county court in its discretion shall think fit." That money was duly paid into court.

The Law Society quite rightly say that they want the costs, which they have been put to on behalf of the infant plaintiff, out of the sum of money which has been paid into court; that they are bound to ask for it because the legal aid fund is public money and the Legal Aid and Advice Act, 1949, puts a duty on them. [His Lordship read section 3 (4) of the Act and continued:] Pausing there for a moment, take a simple case: A man, we will say, gets a certificate to enable him to bring proceedings and we will say that his contribution is assessed at £50. He proceeds with his action, and recovers judgment for £500 and costs, but he can only recover the party and party costs against the defendant. The Law Society can say: "We have on your "behalf paid out extra costs beyond that, there is a sum of £75," which may represent solicitor and client costs, "and, therefore, "we shall want out of the damages the difference between the "£50 and the £75 we have had to pay." That, I think, is the way it would work in the ordinary case. In the present case there is the difference that there was a nil contribution. The infant or his next friend was not ordered to make any contribution towards the costs, but we think that it would be a very narrow construction to place upon section 3 (4) to say that if there is a nil contribution then, although the person may recover heavy damages, no part of these damages is to be subject to this charge for costs.

The only other statutory provision that is material is regulation 19 of the Legal Aid (General) Regulations, 1950, which provides: "(1) Any charge on property recovered or preserved "for an assisted person arising under section 3 (4) of the Act "shall vest in the Law Society. (2) The Law Society may "enforce any such charge in any manner which would be avail-"able if the charge had been given inter partes." The way in which the Law Society endeavoured to enforce their charge was to apply to the county court judge to order payment out of court to them of the amount of the costs to which they had been put. The judge refused to make the order because he was informed of some interlocutory observation which Glyn-Jones J. apparently made when approving the settlement. He said: "I gather that "the defendants have not offered to pay you any costs. We "must leave the legal aid fund to deal with the next friend." His attention was not directed to the Legal Aid and Advice Act or to the regulations, and of course the judge did not make an order with regard to costs. He was not intending to do anything which would override the provisions of the Act or the regulations; he simply made no order with regard to costs.

It seems, therefore, that the only question is whether or not this court can construe section 3 (4) as applying not only to the case where there is a difference between the amount of the contribution and the costs incurred, but also to the case where there is no contribution. The court thinks that it is obvious that that was the intention of the legislature and, therefore, we think that this order must go.

CASSELS J. I agree.

SELLERS J. With regard to the construction of section 3 (4), the assessment of the contribution might be very small, say £5

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or £10, and I see no difference between the position of recovery of costs in those circumstances and where the assessment had been nil. I agree with my Lord's construction of this section.

Order for mandamus.

Solicitors: *Hempsons for Herbert J. Davis, Berthen & Munro, Liverpool.*

J. D. P.

WOOLMER *v.* DELMER PRICE LD.

[1952 W. No. 4465.]

1955
Jan. 11,
12, 13.

McNair J.

Contract — Exceptions clause — No evidence as to how loss occurred — Bailment—Condition—" All goods left at customers' risk "—Loss of goods—No proof that loss due to negligence of bailees—Liability of bailees.
Bailment.

The plaintiff delivered a fur coat to the defendants, either for resale or for storage, on the condition, as printed on the defendants' usual receipt, " All goods left at customers' risk." Subsequently the defendants failed to comply with a demand of the plaintiff for the return of the coat. The plaintiff sued the defendants, claiming in detinue for the return of the coat or its value, and, alternatively, claiming the value of the coat as damages for breach of contract. In the action the defendants failed to substantiate a plea of redelivery and were unable to adduce satisfactory evidence as to what had happened to the coat:—

Held, that although the condition " all goods left at customers' " risk " was apt to exclude liability for loss of a customer's goods by negligence whilst in the defendants' possession at their premises, the defendants could not escape liability unless they proved either that the loss occurred in some way not involving their negligence, or alternatively, that it did occur by their negligence. It followed that, since there was no evidence as to how the loss had occurred, and since the circumstances were such that it might have occurred in a way not covered by the terms of the contract, such as in the course of a dealing with the coat in a way amounting to a fundamental breach of the contract, the condition was not a defence to the action. The plaintiff, therefore, was entitled to recover from the defendants the value of the coat.

Alderslade v. *Hendon Laundry Ld.* [1945] K.B. 189; 61 T.L.R. 216; [1945] 1 All E.R. 244 distinguished.

ACTION.

On May 1, 1952, the plaintiff left with the defendants, Delmer Price Ld., a mink coat either, as alleged by the plaintiff, for the purposes of storage, or, as alleged by the defendants, for the purpose of resale. The defendants' usual receipt contained the printed words "All goods left at customers' risk. Please advise "your insurance of this," and the agreement between the parties was subject to that term.

The plaintiff, alleging that she had demanded the return of the coat but that, in breach of contract, the defendants had failed and neglected to return it to her and had detained it, sued the defendants for the return of the coat or £2,000 its value; alternatively, for £2,000 damages for breach of contract.

The defendants alleged that they had returned the coat to the plaintiff on the evening of May 1, 1952, at her request, and denied detention; they also relied on the term "all goods left at "customers' risk" and contended that the plaintiff was not entitled to any damage.

In the action the defendants' attempted proof of redelivery failed and they were unable to produce any evidence as to how the loss of the coat had occurred.

Eric Falk for the plaintiff.

Michael Lee for the defendants. The words "All goods left "at customers' risk" formed a term of the contract between the plaintiff and the defendants and exclude liability for loss of the plaintiff's property by negligence whilst in the defendants' possession at their premises. Where goods are delivered to a bailee on the terms that the owner is responsible, the bailee is not liable for their loss unless it is due to some act, independent of negligence, outside the four corners of the contract of bailment: *Alderslade* v. *Hendon Laundry Ld.*[1] [Reference was also made to *British Arc Welding Co. (North East Coast) Ld.* v. *London and North Eastern Railway Co.*[2]] The plaintiff complains of a breach of the contract of bailment, and the defendants do not know where the plaintiff's property is; the onus is on the plaintiff to prove that the loss was due to something other than mere failure to return the goods, or that it was due to keeping them in some place not covered by the contract. There is no onus on the bailee to show how the loss occurred; if he cannot find the goods it is presumed, in the absence of proof by the bailor of some deliberate wrong, e.g., theft, that the loss is due to negligence in some matter within the contract. [Reference was also made to *McCawley* v. *Furness Railway Co.*[3]]

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[1] [1945] K.B. 189; 61 T.L.R. 216; [1945] 1 All E.R. 244.

[2] (1942) 73 Ll.L.Rep. 140.

Eric Falk in reply. The plaintiff pleads two cases, breach of contract and detinue. *Alderslade* v. *Hendon Laundry Ld.*[4] was a claim in negligence, not in detinue. Once the plaintiff has proved delivery and that her property has not been returned, the onus is on the defendants in respect of both the claim for breach of contract and the claim in detinue to prove that there has been no negligence on their part. No protective clause operates where there has been a fundamental breach of contract; the loss here might be due to storing the goods in a place other than the defendants' own premises, or to some other fundamental breach of the contract, in which case the defendants could not rely on the protective clause. The defendants, therefore, are not protected unless they can show how the loss occurred.

McNAIR J. In this case the plaintiff, Mrs. Marjorie Bramwell Woolmer, sues the defendants, Delmer Price Ld., claiming the return of a mink coat or £2,000 its value, or alternatively, £2,000 for damages for breach of contract. By her statement of claim the plaintiff alleges that on or about April 30, 1952, the defendants agreed with her to store for reward one wild mink coat, that this mink coat was delivered to the defendants on May 1, 1952, and that when in October, 1952, she made an oral request for its return by herself, by her husband, and by a letter, the defendants failed and neglected to return the coat.

The defence consists, first, of a denial of the contract pleaded, namely, the contract made on April 30 to store, and, secondly, an allegation that in fact the contract, if any, was made on May 1, 1952, when it is said that the defendants agreed that they would try to sell for the plaintiff this mink coat, but that the terms of the agreement were subject to a written term contained in the defendants' receipt: "All goods left at customers' risk." The defendants then plead that on May 1, 1952, the very day upon which the contract is alleged to have been made, they received a telephone message purporting to come from the plaintiff asking them to return the coat to her house, whereupon by their van man they duly delivered the coat at the house and handed it to a female person in the house who purported to be the plaintiff's servant. In those circumstances they deny that they have failed or neglected to return the coat and claim that they have a defence to the action.

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[3] (1872) L.R. 8 Q.B. 57.

[4] [1945] K.B. 189.

[His Lordship considered the evidence, found the facts substantially in accordance with the statement of claim, but that in the course of dealing between the parties the bailment was made on the express terms of the written clause in the receipt set out above, and continued:] The plaintiff has proved a delivery to the defendants and the defendants' attempted proof of redelivery has failed. In those circumstances can it be said that the plaintiff is defeated by the clause in the contract: "All goods left at "customers' risk"?

Mr. Lee submits, on the basis of the decision in *Alderslade* v. *Hendon Laundry Ld.*,[1] that, on the facts admitted, if delivery to the bailee has taken place on the terms that the goods are left at owner's risk, the plaintiff is defeated by the words "All goods "left at customers' risk" unless he can bring his claim against the bailee for some independent wrong other than the mere failure to return the goods or for keeping the goods in some place not covered by the contract.

I do not read *Alderslade* v. *Hendon Laundry Ld.*[1] as going that length. That case was an appeal from the county court and I think that it is clear that the two judgments in the Court of Appeal proceeded on the basis of the facts which had to be found by the county court judge, and that it must be assumed that there was negligence on the part of the defendants which caused the loss of the articles there in question, namely, some Irish linen handkerchiefs handed over for laundering.

It seems to me, however, that, on the facts of the present case, where a fur coat has been handed over for the purpose of storage or, accepting the defendants' case, handed over for the purpose of sale, the defendants do not escape liability unless they establish either that the loss did occur in some way not involving their negligence, or alternatively, that the loss did occur by their negligence. But if, as is the case here, they have failed to adduce satisfactory evidence of how the loss occurred, and the loss may have occurred in a way which would not be covered by the protective clause, then the protective clause does not avail them.

By way of illustration it seems to me that there are two states of fact at least which are consistent with the evidence given here which would not bring the protective clause into operation. One state of fact, and this may very well be the true fact here, is that owing to some confusion in the defendants' premises —and from what I have heard of the way in which their business is conducted there seems to be every opportunity for confusion— this coat may have been sold and its sale mistakenly recorded as a sale of another coat altogether. Such a circumstance would not bring this clause into operation. Secondly, it may be that the coats were put into cold store at a place which was not permitted by the contract, namely, put into cold store with an independent contractor. The common practice was not to keep the coats in cold store at the defendants' own premises but to keep them in cold store elsewhere. If they were kept in cold store elsewhere, then, unless that fact had been brought to the attention of the customer, on the principles of such cases as *Lilley* v. *Doubleday* [2] and others, the protective clause would not avail because there would have been a fundamental breach of the contract by a dealing with the goods otherwise than as authorized by the contract.

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[1] [1945] K.B. 189.

I am unable, accordingly, to take the view that, on my findings of fact, the defendants have brought the case within the protective clause, though I accept without hesitation the submission made by counsel on behalf of the defendants that these words, "All "goods left at customers' risk," are apt to exclude liability for loss by negligence whilst in the defendants' possession at their premises.

The remaining question is as to the measure of damages. [His Lordship considered the evidence given by furriers as to the value of the coat, and continued:] Making the best I can of the evidence, I have come to the conclusion that the true value upon which damages should be assessed is the sum of £600.

Judgment for the plaintiff.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co.; Kenneth Brown, Baker, Baker.*

J. F. L.

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[2] (1881) 7 Q.B.D. 510.

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1955
Jan. 11.

Jenkins and
Morris L.JJ.

WORRALL *v.* REICH.

[1954 W. No. 2926.]

Practice and Procedure — Summons for directions — Robust order — Action for personal injuries—Medical reports—Privileged documents—No power in court to order exchange—R.S.C., Ord. 30, *r.* 6 (4).

Paragraph 23 of Form 3A in Appendix K to the Rules of the Supreme Court, which consists of a form for use on an application for a summons for directions made pursuant to R.S.C., Ord. 30 (introduced in 1954 [1]), contains the following provision: "23. A "medical report to be agreed, if possible, and that, if not, the "medical evidence be limited to two witnesses for each party." In an action for personal injuries the master made an order by which he varied the form to read "Exchange medical reports, if "not agreed, the medical evidence be limited to two witnesses for "each party." Order 30, r. 6 (4), provides that "no . . . "documents which are privileged from disclosure shall be required "to be given or produced under this rule by or by the advisers of "any party otherwise than with the consent of that party":—

Held, on appeal, that medical reports made on behalf of either party on the advice of their legal advisers and for the purpose of preparing their case for trial were privileged documents and as such were within the exception contained in rule 6 (4) and could not therefore properly be made the subject of an order for exchange.

INTERLOCUTORY APPEAL from Glyn-Jones J.

In an action for personal injuries a summons for directions was taken out by the plaintiff pursuant to Order 30, which in its present form was adopted in 1954. Rule 6 [1] of the order is

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[1] R.S.C., Ord. 30, r. 6 (1): "No "affidavit shall be used on the hear- "ing of the summons for directions "except by the leave or direction of "the court or judge, but, subject to "the provisions of paragraph (4) of "this rule, it shall be the duty of "the parties to the action and their "advisers to give all such information "and produce all such documents to "the court or judge on any hearing "of the summons as it or he may "reasonably require for the purposes "of enabling it or him properly to "deal with the summons. The court "or judge may, if it appears proper "so to do in the circumstances, "authorize any such information or "documents to be given or produced "to the court or judge without being "disclosed to the other parties but, "in the absence of such an authority, "any information or documents given "or produced under this paragraph "shall be given or produced to all the "parties present or represented on "the hearing of the summons as well "as to the court or judge."

(3): "If the court or judge on "any hearing of the summons for "directions requires a party to the "action or his solicitor or counsel "to give any information or pro- "duce any document and that "information or document is not "given or produced, then, subject to

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concerned with "the duty to give all available information at "hearing," and Form 3A in Appendix K to the Rules of the Supreme Court provides a form to be used on an application for a summons for directions. Paragraph 23 of the form is in the following terms: "A medical report be agreed if possible and "that, if not, the medical evidence be limited to two witnesses "for each party." Master Clayton made an order in the following terms: "Exchange medical reports, if not agreed, the medical "evidence be limited to two witnesses for each party." The defendant appealed to the judge on the ground that the master had no power to make the order in the form he adopted. The judge affirmed the master's order but gave leave to appeal to the Court of Appeal.

John Ritchie for the appellant. Neither the master nor the judge had power to make an order in the form they adopted, since it is clear that a medical report, prepared on behalf of a party on the part of his legal advisers for the purpose of preparing his case for trial, is a privileged document within the meaning of Ord. 30, r. 6 (4), and as such cannot be the subject of a compulsory order for disclosure. The principles in relation to privilege are to be found in *Anderson* v. *Bank of British Columbia,*[2] and are illustrated in *Friend* v. *London, Chatham and Dover Railway Co.,*[3] which relates in terms to medical reports. Further, an order for directions in the form employed in the present case would compel a party in an action to produce what was equivalent to "the proof" of the medical witness whose report was ordered to be produced. It is submitted that Ord. 30, r. 6, was not intended to have any such effect and that on the clear meaning of paragraph (4) of rule 6 there was no jurisdiction to make the order.

I. F. Reuben for the plaintiff. There was power to make the order. The paramount purpose of Ord. 30, r. 6, is to save time

"the provisions of paragraph (4) of "this rule, the court or judge may— "(*a*) cause the facts to be recorded "in the order with a view to such "special order, if any, as to costs as "may be just being made at the "trial; or (*b*) if it appears to the "court or judge to be just so to do, "order the whole or any part of the "pleadings of the party concerned to "be struck out, or, if the party is "plaintiff or the claimant under a "counterclaim, order the action or "counterclaim to be dismissed upon "such terms as may be just."

(4): "Notwithstanding anything "in the preceding provisions of this "rule, no information or documents "which are privileged from disclosure "shall be required to be given or "produced under this rule by or by "the advisers of any party otherwise "than with the consent of that party."

[2] (1876) 2 Ch.D. 644, 649.

[3] (1877) 2 Ex.D. 437.

and costs. The order would save expense because it would dispense with the necessity for calling witnesses. In the present case the doctors made agreed medical reports and such reports do not fall within the category of privileged documents. The construction put on the rule by the master and the judge is a reasonable one since it would be unfair for the plaintiff to have to send his report to the defendants without being furnished with their medical report at the same time.

JENKINS L.J. This is the appeal, by leave of the judge, of the defendant in an action for personal injuries from an order of Glyn-Jones J. dismissing an appeal from an order for directions made by the master.

The sole matter in issue in the appeal is whether the second paragraph of the order was rightly made by the master in the form in which it was made. That part of the order is in the terms of paragraph 23 of the summons for directions. The summons is based on Form 3A in Appendix K to the Rules of the Supreme Court, but paragraph 23 has been altered in this way: The paragraph as printed is that: "A medical report be agreed, if "possible, and that, if not, the medical evidence be limited to "two witnesses for each party." In the present summons the words "A medical report be agreed, if possible, and that, if "not" were struck out by the master and in lieu thereof these words were inserted: "Exchange medical reports, if not agreed "the medical evidence be limited to two witnesses for each "party."

I take the order to mean that, as in the printed form, a medical report is to be agreed if possible, but failing agreement, then there is to be an exchange of medical reports, and medical evidence given at the trial is to be limited to two witnesses for each party.

The order under appeal was made under the new Order 30, which relates to summonses for directions and was adopted in 1954 to give effect to the recommendations of the Evershed Report. There is no doubt that the order gives ample powers to the master with a view to saving expense and delay in the trial of actions.

For the present purpose I need only refer to rule 6 of the order. [His Lordship read paragraphs (1) and (3) of the rule and continued:] The object of these provisions clearly is to ensure so far as possible that the parties (to use a colloquialism) put all their cards on the table so that the real issues between them emerge, and the amount of evidence necessary to be given, whether documentary or oral, may be limited to matters which are really in issue and seriously contested by the parties. But rule 6 is subject to this important limitation in paragraph (4) which, as will be seen, is expressly referred to in its earlier provisions. Paragraph (4) provides: " Notwithstanding anything in the preceding " provisions of this rule, no information or documents which are " privileged from disclosure shall be required to be given or " produced under this rule by or by the advisers of any party " otherwise than with the consent of that party."

Mr. Ritchie, for the defendant, says that the second paragraph of the order on the summons for directions in the form in which it now stands is in direct conflict with the express provisions of rule 6 (4), inasmuch as medical reports made on behalf of either party on the advice of their legal advisers and for the purpose of preparing their case for trial are privileged documents, and as such are within the exception contained in paragraph (4) of rule 6, and cannot properly be made the subject of an order for exchange. Mr. Ritchie says, further, that an order for directions in this form is a new departure as it has the effect of compelling a party to commit himself in advance to calling a particular witness, inasmuch as it compels him to put in evidence a document amounting to the proof of the evidence which a particular medical adviser will give on his behalf.

In my view, the objection on the ground that medical reports such as these are privileged from discovery is a valid objection, and it follows that the order should not have been made in this form, but should follow the printed form of summons which asks that " A medical report be agreed, if possible, and that, if not, " the medical evidence be limited to two witnesses for each " party." Accordingly, although I can see that in some circumstances it may be desirable from the practical point of view that medical reports should be exchanged, and although it may be highly expedient that the parties should by agreement adopt that course in many cases, it does not seem to me that it can properly be made the subject of an order.

For these reasons I would allow this appeal and modify the order under appeal in the way I have indicated.

MORRIS L.J. I am entirely of the same opinion. I think that it was very helpful that the judge gave leave to appeal and so facilitated a consideration of the matter in this court.

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Having heard the arguments on both sides, I am persuaded that the view which my Lord has just expressed is the correct one. When an order is made in terms that a medical report be agreed if possible, it is doubtless true that certain difficulties may arise. If, for example, the plaintiff submits his medical report and asks that it be agreed, it is always possible that the medical advisers who have been instructed by the defence may take a more serious view of the plaintiff's injuries than has been taken by the plaintiff's medical advisers; indeed, it is possible that the advisers consulted by the defence may have appreciated certain matters which had been overlooked by the medical advisers for the plaintiff. In such a case it might well happen that the defence would agree the medical report submitted to them, and there would be a possibility in that situation of an unjust result, assuming that the plaintiff were able to prove the liability of the defendant. On proof of such liability the plaintiff might receive damages of less amount than the medical facts, if fully appreciated, would really have warranted.

The plaintiff might say that he would submit his medical report or reports, provided that the defendant at the same time submitted his. That, I think, is a desirable state of affairs. In cases where personal injuries have been caused, I think it is proper and desirable that medical reports should be exchanged to the greatest possible extent. If a plaintiff says that he will not submit his report unless the defendant at the same time submits and exchanges his, then there may be a deadlock. In the result it may happen that medical witnesses are called on both sides, and that at the end of the case it is seen that there was not in reality a great deal of difference between the respective medical opinions. In such a situation it would be unfortunate that costs should have been incurred and that the time of medical men should have been spent in court when their services might have been insistently required in the performance of their professional duties.

All these considerations I think indicate that it is helpful and desirable that medical reports should be exchanged. The following language of Ord. 30, r. 1 (1), denotes the correct approach in regard to all these procedural matters: ". . . the "plaintiff shall, with a view to providing an occasion for the "consideration by the court or a judge of the preparations for "the trial of the action, so that—(*a*) all matters which must or "can be dealt with on interlocutory applications and have not "already been dealt with may so far as possible be dealt with; "and (b) such directions may be given as to the future course "of the action as appear best adapted to secure the just, "expeditious and economical disposal thereof . . ." The words "just, expeditious and economical" give clear guidance as to the way in which the court expects parties to proceed in the preparation of their cases. Of course, it may happen that some medical reports contain views, comments or statements which, though linked to the medical aspects of the case, are not entirely limited to those aspects, and such reports might not conveniently be the subject of exchange.

Although I have indicated my personal view that it is helpful that the parties should to the greatest possible extent exchange medical reports, the question that arises in this appeal is whether it was possible for the master to make a compulsory order that medical reports be exchanged. There is merit in the procedure that is indicated in Ord. 30, r. 6 (1), under which the court can ask one side for a document and then examine it without that document being necessarily shown to the other side. That procedure, however, is subject to, and limited by, the express provision of Ord. 30, r. 6 (4): "Notwithstanding anything in "the preceding provisions of this rule, no information or docu"ments which are privileged from disclosure shall be required "to be given or produced under this rule by or by the advisers "of any party otherwise than with the consent of that party."

This shows that the protection which relates to privileged documents is not affected. Hence, I can see no warrant for ordering that medical reports be exchanged if those medical reports are privileged documents. Once they are documents which qualify to be regarded as privileged documents in accordance with well-recognized principles, I cannot see that there is power to order that such documents be compulsorily exchanged. I think, therefore, that this appeal must succeed.

Appeal allowed and order of Glyn-Jones J. varied.

Solicitors: *Barlow, Lyde & Gilbert; Bryan O'Connor & Co.*

P. B. D.

C. A.

1954
Dec. 13, 14, 20.

Denning, Morris and Parker L.JJ.

DAVIS CONTRACTORS LD. *v.* FAREHAM URBAN DISTRICT COUNCIL.

Building—Contract—Delay—Quantum meruit—Specified time for completion—Delay due to scarcity of labour—Neither party in fault—Unexpected lag in demobilization — Work ultimately completed—Claim by contractors on a quantum meruit.

Contract—Frustration. Quantum meruit.

The plaintiff contractors agreed to build 78 houses for the defendant urban district council within a period of eight months for a fixed sum. They had attached to their form of tender a letter stating that it was subject to adequate supplies of labour being available as and when required. Even if that letter formed part of the contract, it no more than excused the contractors for delay. In fact, owing to an unexpected lag in demobilization after the war, and not to any fault on the part of either of the parties, adequate supplies of labour were not available and the work took 22 months to complete. In these circumstances the contractors contended that the contract was void and they claimed to be entitled to be paid on a quantum meruit a sum in excess of the contract price:—

Held, that the fact that without the fault of either there had been an unexpected turn of events which had rendered the contract more onerous was not a ground for relieving the contractor of the obligation he had undertaken and allowing him to recover on a quantum meruit.

British Movietonews Ld. v. *London and District Cinemas Ld.* [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617 and *F. A. Tamplin Steamship Co. Ld.* v. *Anglo-Mexican Petroleum Products Co. Ld.* [1916] 2 A.C. 397, 403; 32 T.L.R. 677, 678 applied.

Bush v. *Whitehaven Port and Town Trustees* (1888) 2 Hudson's Building Contracts, 4th ed., 122 distinguished.

APPEAL from Lord Goddard C.J. on a special case stated by an arbitrator.

In 1946 the plaintiffs, Davis Contractors Ld., agreed to build 78 houses in Hampshire for the Fareham Urban District Council. The contract price was £92,425 8s. 4d., subject to adjustments. The work was to be completed within eight months. Owing, however, to bad weather, but more particularly to an unforeseen shortage of available labour, due to an unexpected lag in the demobilization of troops after the war, the work took 22 months to complete. The contractors received the contract price, which owing to various adjustments amounted to £94,424 17s. 9d., but they claimed that by reason of the delay they were entitled to treat the contract as void and to be paid on a quantum meruit.

The claim having been referred to an arbitrator, he found that the contract had been entered into on the basis that adequate supplies of labour and materials would be available and that, as they were not, the footing of the contract was so changed that it became void, and he awarded the contractors an additional £17,258 13s. 1d. on a quantum meruit, applying the principle in *Bush* v. *Whitehaven Port and Town Trustees.*[1]

On appeal by the council, by case stated, Lord Goddard C.J. held that on the wording of the contract the contractors were entitled to throw over the contract and sue on a quantum meruit. The council appealed from that decision to the Court of Appeal (Somervell, Birkett and Romer L.JJ.), which resulted in the case being remitted to the arbitrator for further findings.

The arbitrator having made a supplemental award the present appeal was heard.

H. J. Phillimore Q.C. and *Stephen Chapman* for the council. It is submitted that the letter of March 18, 1946, did not become a term or condition of the contract; but even if it did it is contended that, in the events which happened, the contractors are not enabled to recover any sum in excess of the contract price. By the terms of the contract the contractors rendered themselves liable to supply adequate labour and material. Even the stipulation that labour should be obtained locally was limited to unskilled labour, of which, in fact, there was at no time any serious shortage. The footing on which the contract was agreed was not so changed that the contract could be declared or treated as void, or the contractors to be entitled to payment on a quantum meruit. The justification for any payment in excess of the contract price can only be founded on strict legal principle and not on sympathy for the contractors. The contractors knew that there was a shortage of labour and materials at the time of making the contract. If the contractor miscalculates he is responsible. The terms of the contract show that the council were seeking to obtain a firm contract, utterly inconsistent with any overriding provision.

Bush v. *Whitehaven Port and Town Trustees* [2] is inapplicable. The arbitrator does not suggest that at any particular point there was a sudden change in the circumstances. All he says is that this unfortunate contractor could not get the labour he wanted. It is submitted that clearly there was no change of circumstances.

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[1] (1888) 2 Hudson's B.C., 4th ed., 122.

[2] Ibid.

[Parker L.J. May not the delay in demobilization be a change?]

It may be a basis for extending the time, but it does not entail the payment of more money. The real basis of *Bush* v. *Whitehaven Port and Town Trustees* [2] is that the employer failed to do his part of the contract. No one suggests that the council here are in any way in default.

Cyril Salmon Q.C. and *Stuart Daniel* for the contractors. It is contended by the council that this was no more than a contemplated event. It must be a question of degree. Is the delay so great as to transmute the very nature of the job? That is what the arbitrator has found. It must be remembered that the court has to go back to the year 1946, when everything was in a state of flux; the council was anxious to get the buildings erected, and at the time the contract was signed both parties believed there would be an adequate supply of labour and material to enable the contract to be completed within eight months. Any normal departure from the contract time is dealt with by an extension of the time clause; but when there is delay so great that it transmutes the whole nature of the work, that is entirely outside what the parties contemplated, and does not fall to be dealt with by the extension of the time clause. The whole contract goes, just as it did in *Bush* v. *Whitehaven Port and Town Trustees.*[2] It must be a question of degree, and the arbitrator has found that the degree was so great that the contract went. This is in fact a much stronger case than *Bush* v. *Whitehaven Port and Town Trustees,*[2] the basis of which, it is submitted, was not default or breach of contract by the employers. [*Sir Lindsay Parkinson & Co.* v. *Commissioners of Works and Public Buildings* [3] was referred to.]

Phillimore Q.C., in reply, referred to *F. A. Tamplin Steamship Co. Ld.* v. *Anglo-Mexican Petroleum Products Co. Ld.*[4]

Cur. adv. vult.

Denning L.J., having stated the facts, continued: There are two points in the case: first, whether this extra payment of £17,258 13s. 1d. is justified by the wording of the contract; secondly, whether it is justified by the general law on the principle of *Bush* v. *Whitehaven Port and Town Trustees*.[1] The arbitrator has made two awards: an original award in the form of a special case, and a supplemental award. The original award came before Lord Goddard C.J., who decided in the contractors' favour on the first point. He thought that, on the wording of the contract, the contractors could throw over the contract price and sue on a quantum meruit. It was unnecessary for him, therefore, to go into the second point.

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[2] 2 Hudson's B.C., 4th ed., 122.

[3] [1949] 2 K.B. 632; [1950] 1 All E.R. 208.

[4] [1916] 2 A.C. 397.

On an appeal from him to this court, consisting of Somervell, Birkett and Romer L.JJ., this court differed from him on the first point. They thought that the wording of the contract was not sufficient to enable the contractors to throw over the contract price. It was necessary, therefore, for them to consider the second point, but, as the findings of the arbitrator were not sufficiently specific, they remitted the case to him for further findings. He has now made a supplemental award in which he decides under the general law that the footing of the contract was so changed that its provisions no longer apply.

Both points have been canvassed afresh before us. We have thought it right to consider, not only the second point, but also the first point, because, although this court gave a ruling upon it, it was never embodied in a formal decision. First, then, the wording of the contract. When the contractors submitted their tender to the Fareham Council, they attached to it a letter dated March 18, 1946, in which they said: "Our tender is subject to "adequate supplies of material and labour being available as and "when required to carry out the work within the time specified." There is some little doubt whether that letter was incorporated in the final contract, because it was not included amongst the documents that were signed and exchanged. But I approach the case on the footing that it was incorporated. The contractors say that this letter meant that the whole contract was subject to the condition that adequate supplies of material and labour would be available as and when they were required, with the result that if adequate supplies were not available the contract was no longer binding on them. This may be the literal interpretation of the letter, but it is not the reasonable interpretation of it. The only reasonable interpretation of the condition in the letter is to hold that it deals only with the time of completion. It means simply this: that, if adequate supplies of material and labour should not be available when wanted, the contractors will be excused from completing the work within eight months and will be given a reasonable time. The condition affects the time, but not the price. That is the interpretation which this court on the previous occasion unanimously put upon the condition, and I entirely agree with them. So interpreted, the condition has been fully honoured. Although the work took as long as 22 months instead of eight months, the Fareham Council have not sought to claim damages for the delay. But the letter does not give the contractors any right to a higher price on that account.

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[1] (1888) 2 Hudson's B.C., 4th ed., 122.

Secondly, the application of *Bush* v. *Whitehaven Port and Town Trustees.*[1] The arbitrator decided in favour of the contractors because he thought that the case came within the principle of *Bush* v. *Whitehaven Port and Town Trustees.*[2] We have therefore to consider what is the principle contained in that case. The facts were these: in 1886 Bush agreed with the trustees to build a water main in the Lake District for £1,335. The contract was made in June and the work was to be done in the next four months, which were the dry summer months. Bush made his tender on that footing. The trustees were to give him possession of the site as and when required, but they failed to do so. The land was not all available until October 6. The result was that the work had to be done in the wet winter months instead of the dry summer months. Bush claimed an extra payment on that account. His difficulty was that there was an express clause in the contract saying that, if the site was not made available in time, the contractor should be entitled to an extension of time but not to any increase of payment. But the courts got over that clause. The jury found that the conditions of the contract were so completely changed, in consequence of the defendants' inability to hand over the site in the time required, as to make the special provisions of the contract inapplicable. On that finding it was held by this court that Bush was entitled to a further £600 over and above the contract price. Lord Esher M.R. said[2]: "The condition of things had been so altered after the "making of the original contract (they had been so greatly "altered) that it was not reasonable, or right, or fair, or just, to "hold that the original contract was made with regard to those "circumstances." He held that in the new situation Bush had a claim for a fair remuneration for the work done, in other words, to a quantum meruit.

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[1] 2 Hudson's B.C., 4th ed., 122.

[2] Ibid. 122, 131.

The arbitrator thought that *Bush's* case [3] applied here because, just as in that case a summer contract was turned into a winter contract, so here an eight months' contract was turned into a 22 months' contract. He said: "I find that the footing of the "contract was so changed that it became void and the claimants "are entitled to a fair and reasonable price for the work they "have done."

There is, however, a great difference between *Bush's* case [3] and the present one. The Whitehaven Trustees there had themselves failed in their duty to deliver the site to the contractor. This failure on their part did not give rise to a claim for damages against them—they had been careful to safeguard themselves against that—but nevertheless it was a failure within their sphere of operations. It had created a fundamentally different situation in which it was unjust to hold the contractor bound by the contract price. He was, therefore, released from it and allowed to sue on a quantum meruit. Likewise in the recent case of *Sir Lindsay Parkinson & Co.* v. *Commissioners of Works and Public Buildings*,[4] the Commissioners of Works, by ordering extra work to the tune of £1,000,000, themselves created a fundamentally different situation, in which it was unjust to hold the contractors bound by the limitation of profit contained in the contract. The contractors were therefore released from that limit and allowed to sue on a quantum meruit.

It would not be correct to regard those cases as frustration cases. They are illustrations of a very old principle laid down by Lord Coke long ago, that a man shall not be allowed to take advantage of a condition brought about by himself: see Coke upon Littleton, 206b, quoted in *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France*,[5] *per* Lord Finlay L.C.: see also *Maritime National Fish Ld.* v. *Ocean Trawlers*.[6] In this connexion the principle means this: that if, in the course of carrying out a contract, a fundamentally different situation—different, that is, from anything which the parties had in contemplation—is brought about by the conduct of one of them, then, even though his conduct may not be a breach of contract, he will not be allowed to take advantage of the new situation to the detriment of the other party when it would be unjust to allow him to do so. Recent illustrations of this principle are *Jennings* v.

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[3] 2 Hudson's B.C., 4th ed., 122.

[4] [1949] 2 K.B. 632; [1950] 1 All E.R. 208.

[5] [1919] A.C. 1, 7, 8.

[6] [1935] A.C. 524.

Woodman[7] and *Brewer Street Investments* v. *Barclays Woollen Co. Ld.*[8]

At one point in the argument Mr. Salmon tried to bring the present case within that principle. He suggested that the reason why labour was not available for this contract was because the Fareham Council had licensed or started much other work at the same time, which had drawn away much labour from this work. The arbitrator, however, made no finding to this effect. On the contrary, he found that the trouble was "the national shortage "of building labour at that time due to the unavoidable and "unforeseen lag in demobilization." That was not a thing for which the Fareham Council were responsible. The case cannot therefore be brought within the principle of *Bush* v. *Whitehaven Port and Town Trustees.*[9]

This case then becomes simply one where, without the fault of either party, there has been an unexpected turn of events which renders the contract more onerous than the parties had contemplated. This is no ground for relieving the party of the obligation he has undertaken. That is made quite clear by the decision of the House of Lords in *British Movietonews Ld.* v. *London and District Cinemas Ld.*[10] When an owner employs a builder to do work for a fixed sum, his whole object is to secure himself against the unexpected difficulties which so often arise. We would seriously damage the sanctity of contracts if we allowed a builder to charge more simply because, without anyone's fault, the work took him much longer than he thought. I would allow the appeal, accordingly.

Morris L.J. When this appeal was before this court in July, 1954, the court ordered that the special case be referred back to the arbitrator so that he might make further findings of fact for the information of the court relevant to the application of the principle in *Bush* v. *Whitehaven Port and Town Trustees*[11] and the contentions of the parties on that issue. The previous award was not in certain respects clear and the arbitrator was invited, if he intended his award to be a final award, to state his own conclusions in relation to the contentions. The arbitrator made a supplemental award which is now before the court.

The previous award, which was stated in the form of a special case, formulated two questions of law. The first was: "Whether "the stipulation as to availability of labour and materials made "in the claimants' letter of 18th March, 1946, became a term "of contract." The second was: "Whether the contractors are "entitled to be paid any sum in excess of £94,424 17s. 9d. "already paid them." If the answer to the first question was "Yes," then the arbitrator awarded £17,651 13s. 1d. to be paid to the contractors. If the answer to the first question was "No," but to the second question it was "Yes," then he awarded the like sum to be paid to the contractors. If the answer to both questions was "No," then he awarded no further sum to the claimants.

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[7] [1952] 2 T.L.R. 409.

[8] [1954] 1 Q.B. 428; [1953] 2 All E.R. 1330.

[9] 2 Hudson's B.C., 4th ed., 122.

[10] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[11] 2 Hudson's B.C., 4th ed., 122.

When the special case came before Lord Goddard C.J. he answered the first question in the affirmative. He so answered the first question because he held that the contract was subject to a condition that adequate supplies of material and labour would be available. As they had not been available the contract ceased to operate and the contract price no longer held good. The work of erecting the houses had, however, continued, and continued with the concurrence of the district council: the result of this was that the district council impliedly promised to pay a reasonable sum. Being of this opinion the Lord Chief Justice accordingly answered the second question also in the affirmative. This was because the amount payable on a quantum meruit basis was found by the arbitrator to be an amount which exceeded the amount already paid by £17,651 13s. 1d. The contractors themselves agreed that a sum of £393 ought in fact to be deducted from this figure. The Lord Chief Justice did not uphold the suggested application of the principle in *Bush* v. *Whitehaven Port and Town Trustees.*[11] He said: "It is not necessary to go as far as "in *Bush* v. *Whitehaven Port and Town Trustees*, a well-known "case which has apparently been approved by the House of Lords "as well as by the Court of Appeal. I do not think that it is "necessary to go as far as that because I do not think that it is a "destruction of the whole foundation of the contract."

When the appeal came before this court in July, 1954, the court, having heard full arguments from both sides on all questions relating to the applicability and effect of the letter of March 18, 1946, the court did not call for a reply from the council in regard to that part of the case. Somervell L.J., addressing their counsel, said: "Mr. Phillimore, on the first point, my brethren

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[11] 2 Hudson's B.C., 4th ed., 122.

"both take the view that the letter must be regarded as incorporated. I am not quite sure about it, but we all take the view "that we do not want to hear you on the construction: that is "to say, assuming the letter was incorporated we accept your "argument that these words do not give the contractors a right "to claim the £17,000." The court did not, however, reach the stage of giving judgment, for when passing on to consider whether the principle in *Bush* v. *Whitehaven Port and Town Trustees* [11] applied, the court came to the view that the award did not sufficiently set out the arbitrator's findings of fact referable to this issue. It was decided, therefore, to remit the award to the arbitrator, the parties having liberty to reformulate their contentions. A supplemental award has now been made and is before the court, which is, however, now differently constituted, and the matters previously argued have therefore been re-argued, and it becomes necessary for the court to arrive at independent conclusions.

In the supplemental award the questions of law have been somewhat reformulated. They are as follows: "(1) Whether the "stipulation as to the availability of labour and materials made "in the claimants' letter of March 18, 1946, became a term of "contract; (2) whether the claimants are entitled to be paid "any sum in excess of the £94,424 17s. 9d. already paid them, "namely, on a quantum meruit, by reason of (a) the footing "upon which the contract was made having been so changed in "the course of its execution that its provisions no longer applied, "or (b) an implied term in the contract that it ceases to bind "in the circumstances as found. (3) Whether if the claimants "became entitled to claim any sum in excess of that already "paid to them by the respondents such a claim was barred by the "conduct of the parties after the claimants had first intimated "their intention to claim additional payment."

There are in effect two main issues to be considered when dealing with the questions of law which the award states for the opinion of the court. They are: A. Is the letter of March 18, 1946, to be regarded as forming a part of the contractual documents and, if so, what is its meaning and effect? B. Are the contractors, in reliance upon *Bush* v. *Whitehaven Port and Town Trustees*,[11] entitled to be paid a sum in excess of what they have already received? I will set out my conclusions in regard to these two main issues.

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[11] 2 Hudson's B.C., 4th ed., 122.

[His Lordship, giving reasons, stated as to A. his opinion that the letter of March 18, 1946, should be regarded as included in the contractual documents. He held, however, that the words of the second paragraph of the letter did not entitle the contractors to treat the contract as coming to an end when adequate supplies of material or labour failed, so as to entitle them to found a claim, on the basis of quantum meruit, for amounts exceeding the contract price; but merely to relieve them of liability for damages if the time limit was exceeded. He continued:—]

I pass now to B. It is important to have in mind the main findings of the arbitrator and the way in which they are expressed. Paragraph 4 (6) of the award is as follows: "At the "time of entering into the said agreement the claimants and "the respondents anticipated that there would be available in "the building industry a sufficient labour force and a sufficient "supply of materials to enable the work specified in the agree-"ment to be carried out substantially within the time stipulated "in the agreement." By sub-paragraph (7) the arbitrator found: "The conditions in which the work had to be carried out "were different from those anticipated by the claimants and the "respondents," and he sets out the various features. In the supplemental award there are the following findings:—under (D) (*a*) (3): "I find that both parties entered into the contract "on the basis that adequate supplies of labour and materials "would be available at the times required. (3) I find that "adequate supplies of labour and material were not available at "the times required and that as the duration of the work was "unavoidably extended from a period of eight months to one of "twenty-two months the footing of the contract was removed, "from which it follows that the claimants are entitled to be "paid a fair and reasonable price for the work they have done." Under (D) (*b*) (4) he says: "I find that the footing of the con-"tract was so changed that it became void and the claimants are "entitled to a fair and reasonable price for the work they have "done."

It is clear that some of these findings involve a blend of law and fact, but what the arbitrator is holding is, I think, reasonably plain. Some of the words which he uses need some consideration. It is said that both parties entered into the contract on the "basis" that adequate supplies of labour and materials would be available when required: it is said that the "footing" of the contract was so changed that the contract became void.

It is manifest, and it has been held by the arbitrator, that the parties anticipated that labour and materials would be available: it is held that these expectations were not realized. In one sense, therefore, the basis upon which the parties had proceeded no longer remained. But before it can result as a matter of law that a contract becomes at an end it must appear that the parties to the contract only intended to remain bound by their contract provided that some basis or footing continued to exist. If A, a builder, enters into a contract with B by which A promises to build a house for B within a period of 12 months for £X, it may well be that both A and B would confidently have believed that labour conditions would enable A to complete the building of the house within the contract period. In one sense that would be the basis or footing upon which they would have proceeded. If unexpected labour difficulties occurred, so that A became involved in much extra cost and asserted that the contract had ended and that B should on the basis of a quantum meruit pay an increased amount, he would probably find that B could successfully say that there was no room for any implication that the contract should not continue to bind, even though the builder for his part had run into difficulties. B might be sympathetic with A in his difficulties but would resist any suggestion that there had been any implication that in the event of any such difficulties occurring the contract would cease to have binding validity.

In *British Movietonews Ld.* v. *London and District Cinemas Ld.*[12] Lord Simon said: "If, on the other hand, a consideration "of the terms of the contract, in the light of the circumstances "existing when it was made, shows that they never agreed to "be bound in a fundamentally different situation which has now "unexpectedly emerged, the contract ceases to bind at that "point—not because the court in its discretion thinks it just "and reasonable to qualify the terms of the contract, but "because on its true construction it does not apply in that "situation." Words of great importance in the dictum which I have just quoted are the words "never agreed to be bound."

Much to the same effect was a passage in the speech of Lord Loreburn in *F. A. Tamplin Steamship Co. Ld.* v. *Anglo-Mexican Petroleum Products Co. Ld.*[13]: "But a court can and ought to "examine the contract and the circumstances in which it was

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[12] [1952] A.C. 166, 185.

[13] [1916] 2 A.C. 397, 403; 32 T.L.R. 677, 678.

"made, not of course to vary, but only to explain it, in order to "see whether or not from the nature of it the parties must have "made their bargain on the footing that a particular thing or "state of things would continue to exist. And if they must have "done so, then a term to that effect will be implied though it be "not expressed in the contract. In applying this rule it is "manifest that such a term can rarely be implied except where "the discontinuance is such as to upset altogether the purpose "of the contract. Some delay or some change is very common "in all human affairs, and it cannot be supposed that any bargain "has been made on the tacit condition that such a thing will not "happen in any degree. . . . In most of the cases it is said that "there was an implied condition in the contract which operated "to release the parties from performing it, and in all of them I "think that was at bottom the principle upon which the court "proceeded. It is in my opinion the true principle, for no court "has an absolving power, but it can infer from the nature of the "contract and the surrounding circumstances that a condition "which is not expressed was a foundation on which the parties "contracted."

In *Bush* v. *Whitehaven Port and Town Trustees*[14] the plaintiff sent in his tender in the month of June and was given to understand that he was to begin at once and was to have four months in which to finish the work, and his calculations were made on that footing. The contract contained certain express provisions in regard to the commencement of the work and the time for completion, and there was a provision that non-delivery of the use of the site was not to vitiate or affect the contract. The defendants did not in fact make the site available until October. Instead of being summer work the work became winter work. The plaintiff claimed to treat the contract as at an end and to recover upon a quantum meruit. At the trial the jury answered in the affirmative the question: "Were the conditions "of the contract so completely changed in consequence of the "defendants' inability to hand over the sites of the work as "required as to make the special provisions of the contract "inapplicable?" On the answers of the jury to the questions put to them the plaintiff succeeded. Lord Esher M.R., in his judgment in the Court of Appeal, said that there was evidence which entitled the jury to say that the new state of circumstances was so different from the former that it was wholly unreasonable and unjust to suppose that either party, if they had known the new state of circumstances, would have made the same contract in regard to them. *Bush* v. *Whitehaven Port and Town Trustees*[14] was therefore a case in which it was shown and held that the parties had never agreed to be bound in the fundamentally new state of affairs: they must have made their bargain on the footing that the plaintiff would get on to the site in the month of June.

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[14] 2 Hudson's B.C., 4th ed., 122.

In the present case, though both parties thought that labour and material would be available when required, I can see no warrant for holding that the contract was only to bind if labour and material were available when required. The claimants raised the topic of the availability of labour and material in the covering letter. If, contrary to the view which I have expressed, the second paragraph of that letter brought it about that the contract came to an end when it happened that labour or material were not available when required, then the matters which I am now considering do not arise. But if the view that I earlier expressed is correct, then the claimants were providing for an extension of time and a freedom from penalties in the event of being held up by shortages of labour or material, and were therefore providing for a continuance of the contract in that eventuality. In my judgment, there are no circumstances in the present case similar to those in *Bush* v. *Whitehaven Port and Town Trustees*[14] which show that conditions so completely changed as to make the special provisions of the contract inapplicable.

In the present case the parties anticipated that difficulties would not arise, but they envisaged the possibility that the difficulties might arise and in my view made a provision (by the terms of the covering letter) which would be applicable if the difficulties arose: there was no question of some unexpected emergence of a fundamentally new situation. The indications are therefore that they contemplated that the contract would be binding even though their anticipations as to availability of labour and material might be disappointed. The findings of the arbitrator do not show or establish that the contract would cease to bind if supplies of labour or material became, or over a long period remained, unavailable. Though the basis or footing of the contract was removed in the limited sense that the anticipations of the parties were not realized, the facts found do not require an implication in the contract that it was to come to an end if those anticipations were not realized. Such an implication is not necessary and cannot be said to be denoted by the conduct or actions of the parties, but on the contrary to be negatived. The contract provisions, therefore, did not cease to apply and the claimants are not entitled to be paid on the basis of a claim by way of quantum meruit.

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[14] 2 Hudson's B.C., 4th ed., 122.

For these reasons, while I would answer the first question of law: "Yes, but not so as to entitle the claimants to any of the "sums now claimed," I would answer the second question in the negative: the third question does not therefore arise. It follows that in my view the appeal succeeds.

Parker L.J. The first question which arises in this appeal concerns paragraph 2 of the letter of March 18, 1946, from the contractors, which accompanied their form of tender. That paragraph reads as follows: "Our tender is subject to adequate "supplies of material and labour being available as and when "required to carry out the work within the time specified." The arbitrator has found that largely as a result of a shortage of skilled labour the contract work took 22 months as against the specified time of eight months. The question involves considering whether that letter formed part of the contract between the parties, and, if so, what, on a true construction, the paragraph in question means.

For myself, I have come to the conclusion that this letter of March 18 did not form part of the contract ultimately entered into in July. But even if I am wrong I share the view expressed by my Lords as to the meaning of paragraph 2 of the letter. [His Lordship gave his reasons for those views, and continued:]

It was further contended on behalf of the contractors—indeed this was Mr. Salmon's main point—that quite apart from any express term in the contract they were entitled to claim a quantum meruit based on the arbitrator's finding that "the "footing upon which the contract was made has been so changed "in the course of its execution that its provisions no longer "apply": in other words, frustration. This is a finding of law, or at any rate of mixed fact and law, and the real question for the court is whether the primary facts found entitle the arbitrator to make this finding. The council in asking the contractors to tender for completion in eight months and the contractors in tendering on that basis clearly anticipated that enough labour would be available, and indeed the arbitrator so finds. He further finds that a contractor can only hold a nucleus of foremen and leading hands and depended at the time on getting labour through the Labour Exchanges, and that in the present case the contractors were unable to get labour from the Exchanges "due to the "unavoidable and unforeseen lag in demobilization." Largely as a result of this he finds that the contract ceased to be substantially an eight months contract and became one of 22 months.

The question, accordingly, for this court can be stated simply as follows, namely, whether in these circumstances the contractors' inability to get skilled labour (the main cause of the delay), an inability not due to the fault of either party, is enough to justify a finding of frustration. In approaching this question it is important to bear in mind the warning expressed by Lord Simon in *British Movietonews Ld.* v. *London and District Cinemas Ld.*,[15] where he says: "The parties to an executory "contract are often faced, in the course of carrying it out, with "a turn of events which they did not at all anticipate—a wholly "abnormal rise or fall in prices, a sudden depreciation of "currency, an unexpected obstacle to execution, or the like. Yet "this does not in itself affect the bargain they have made." It is no doubt for this reason that the supervening event is in general a "catastrophic event": *per* Asquith L.J. in *Sir Lindsay Parkinson & Co.* v. *Commissioners of Works and Public Buildings*,[16] where he says: "Frustration cases differ from the present "case, in so far as in many of them a catastrophic event is "involved. A catastrophic event, caused by the act of neither "party, intervenes, destroying some basic, though tacit, assump- "tion on which the parties have contracted, and along with that "assumption destroying the contract itself." It is also important to bear in mind the nature and conditions of the contract itself. Where, as here, the contract conditions (see clause 3 of general conditions) provide for an extension of time being granted for delay the "catastrophic event" must cause a delay so abnormal as to fall outside what the parties could have contemplated in the clause: see *Metropolitan Water Board* v. *Dick Kerr & Co.*[17]

Applying these considerations, I cannot find in the facts found by the arbitrator anything sufficient to justify his finding of law. Strong reliance was, however, placed on the decision in *Bush* v. *Whitehaven Trustees*[18] which, as Cohen L.J. in *Parkinson's* case[19] pointed out, involved the implication of a term that the contractor should not be bound to complete the work if the assumed state of affairs did not exist. Yet in that case there was no catastrophic event and the contract, as here, provided for what was to happen in the event of delay. It is, however, important to realize that the assumed state of affairs in that case was that the building owners, the defendants, should hand over the sites with reasonable despatch to enable the work to be completed substantially within the contract time. In the events which happened a summer contract was converted by the action of the defendants into a winter contract, and the jury found that in consequence the conditions of the contract had so completely changed as to make the special provisions of the contract inapplicable. It seems to me that where the assumed state of affairs ceases to exist by reason of the action of the defendants, as it did in that case, it is much easier to imply that the special exemption provisions, and indeed the whole contract, have ceased to be applicable. It is quite another thing to imply such a term when the assumed state of affairs has ceased to exist through no fault of the defendants and without any catastrophic event. I would allow the appeal and answer the first two questions in the award in the negative.

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[15] [1952] A.C. 166, 185.

[16] [1949] 2 K.B. 632, 665.

[17] [1918] A.C. 119; 34 T.L.R. 113.

[18] 2 Hudson's B.C., 4th ed., 122.

[19] [1949] 2 K.B. 632, 655.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Kingsford, Dorman & Co., for Blake, Lapthorn, Roberts & Rea, Portsmouth; Blakeney & Marsden Popple.*

A. W. G.

INSTITUTE OF FUEL *v.* MORLEY (VALUATION OFFICER) AND ST. MARYLEBONE METROPOLITAN BOROUGH COUNCIL.

C. A.
1954
Nov. 10, 11;
Dec. 15.

Evershed M.R., Jenkins and Birkett L.JJ.

Rates and Rating—Scientific Society—Exemption—Society to promote fuel technology—Scientific purpose—Benefit of members—Collateral purpose—Whether instituted for scientific purposes exclusively—Scientific Societies Act, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.
Charity.

The Institute of Fuel was incorporated by royal charter in 1946. Paragraph 7 of the charter provided that the purposes for which the institute was constituted were: "(a) To promote, foster, and develop "the general advancement of the various branches of fuel technology "as an end in itself, and as a means of furthering the more scien-"tific and economic utilization of fuel of all kinds for industrial, "commercial, public, agricultural, domestic, transport and/or "other purposes, and to promote, assist, finance and support such "industrial and scientific research, investigation, and experimental "work in the economical treatment and application of fuel as the "institute may consider likely to conduce to those ends, and to the "benefit of the community at large. . . . (d) To uphold the status "of members of the institute by holding or prescribing examinations "for candidates for election and by requiring standards of knowledge and experience which can be approved. . . ." The institute occupied premises in the Metropolitan Borough of St. Marylebone and claimed to be a body entitled to exemption from rates as being "instituted for purposes of science . . . exclusively" within section 1 of the Scientific Societies Act, 1843. The Lands Tribunal held that they were not such a body and accordingly not entitled to exemption:—

Held (Evershed M.R. and Birkett L.J., Jenkins L.J. dissenting), that under sub-paragraph (d) of clause 7 of the institute's charter a distinct and avowed object of the institute was to establish and uphold the professional status of fuel technologists who should become members of the institute; that that purpose could not be classed as a purpose of science in any way and accordingly that the Institute of Fuel, although it was instituted for purposes of science, was not instituted for such purposes exclusively and could not make good its claim to exemption from rates under section 1 of the Scientific Societies Act, 1843.

Inland Revenue Commissioners v. *Forrest* (1890) 15 App.Cas. 334; 6 T.L.R. 456 considered.

Institution of Civil Engineers v. *Inland Revenue Commissioners* [1932] 1 K.B. 149; 47 T.L.R. 466 distinguished.

Metropolitan Borough of Battersea v. *British Iron and Steel Research Association* [1949] 1 K.B. 434; 65 T.L.R. 183 applied. *Royal College of Surgeons of England* v. *National Provincial Bank Ld.* [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984 distinguished.

Per Jenkins L.J. The purpose of paragraph 7 (d) was plain, and was simply to ensure that membership of the institute should be confined to persons who had attained a suitable degree of proficiency in the field of technology. That was one of the matters classed as merely ancillary in the authorities.

APPEAL by case stated from a decision of the Lands Tribunal, affirming a decision of the local valuation court for North-West London.

The appellants, the Institute of Fuel, occupied hereditaments described as offices and premises at 18, Devonshire Street, Marylebone. The local valuation court for North-West London on July 8, 1953, determined that the hereditaments should be inserted in the valuation list for the Metropolitan Borough of St. Marylebone with gross value £365, rateable value £301. The institute appealed from that decision to the Lands Tribunal, claiming to be exempted from rates under section 1 of the Scientific Societies Act, 1843,[1] on the ground that under the royal charter by which it was incorporated it was "instituted for "purposes of science . . . exclusively. . . ." The Lands Tribunal dismissed the institute's appeal.

The institute appealed.

The Institute of Fuel was incorporated by royal charter granted in 1946. The charter, after providing for the incorporation of the then members of the Association known as the "Institute "of Fuel," a company incorporated under the Companies Acts, 1908 to 1917 (thereinafter called the existing institute), as a body corporate by the name of the "Institute of Fuel" and providing for the holding of land by such institute, continued as follows:

"5. The income and property of the institute shall be applied "solely towards the promotion of the objects of the institute "as hereinafter defined. The institute shall not carry on any "trade or business or engage in any transaction with a view to "the pecuniary gain or profit of the members thereof."

"6. The members of the institute shall not have any personal "claim on any property of the institute, and no portion of the "income or property of the institute shall be paid or transferred "directly or indirectly by way of dividend or otherwise howsoever "by way of profit to persons who at any time are or have been "members of the institute or to any of them, provided that "nothing herein contained shall prevent the payment in good "faith of remuneration to any officer or servant of the institute "or other person in return for any services rendered to the "institute, or prevent the giving of privileges to the members of "the institute, or prevent the borrowing of money from any "member of the institute at a rate of interest not greater than "5 per cent. per annum."

"7. The objects and purposes for which the Institute of Fuel "is hereby constituted are:—

"(a) To promote, foster, and develop the general advance-"ment of the various branches of fuel technology as an end "in itself, and as a means of furthering the more scientific "and economic utilization of fuel of all kinds for industrial,

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[1] Scientific Societies Act, 1843, s. 1: ". . . no person . . . shall be "assessed or rated . . . or liable to "pay . . . rates . . . in respect of "any land, houses, or . . . buildings "belonging to any society instituted "for purposes of science, literature, "or the fine arts exclusively . . . "and occupied by it for the trans-"action of its business, and for "carrying into effect its purposes ". . ."

"commercial, public, agricultural, domestic, transport and/or "other purposes, and to promote, assist, finance and support such "industrial and scientific research, investigation, and experi-"mental work in the economical treatment, and application of "fuel as the institute may consider likely to conduce to those "ends, and to the benefit of the community at large.

"(b) To hold meetings in London and at established provincial "centres for the reading and discussion of papers, to issue "regularly a technical journal, to join with other institutions in "promoting objects of mutual interest, and generally to take "such a prominent and active part in the advancement of the "knowledge and practice of fuel technology as its status requires.

"(c) To co-operate with government departments, univer-"sities, educational institutions, associations, companies or "individual persons in establishing or maintaining any investiga-"tion or research relating to any branch of fuel technology.

"(d) To uphold the status of members of the institute by "holding or prescribing examinations for candidates for election "and by requiring standards of knowledge and experience which "can be approved.

"(e) To print and publish, sell, lend and distribute any "communications made to the institute or any similar society, "and any reports of the proceedings or transactions of the "institute or any similar society, and to produce, purchase, "reproduce, print, publish and distribute any other books, papers, "treatises or communications relating to fuel technology and to "establish and maintain a library.

"(f) To invite foreign delegates to attend any meetings, "conferences or functions promoted or supported by the institute "and to defray or contribute to their expenses; to defray or "contribute to the expenses of any duly appointed officials or "representatives of the institute attending any foreign scientific "meetings or conferences at the request of the council of the "institute, and to translate, print, publish and distribute any "books, communications, papers or proceedings or abstracts or "extracts thereof which are of scientific interest.

"(g) To provide facilities for conferences and functions in "support of the objects of the institute.

"(h) To do all other things incidental or conducive to the "attainment of the above objects or any of them."

Then, after providing for the constitution of the council of the institute, the charter provided:

"12. The government and control of the institute and its "affairs shall be vested in the council subject to the provisions "of these presents and to the bye-laws of the institute. The "business of the council shall be conducted in such manner as "the council may from time to time prescribe."

"14. Unless and until the bye-laws of the institute shall "otherwise provide, the corporate members of the institute "shall be of four classes, namely, honorary members, fellows, "members, and associate members.

"There shall also until otherwise provided as aforesaid be "three classes to whom privileges in relation to the institute "may be granted. These shall be termed respectively associates, "students and collective members, and shall be known collectively as non-corporate members of the institute.

"The honorary members, fellows, members, associate "members, associates, students and collective members of the "existing institute shall be deemed to be honorary members, "fellows, members, associate members, associates, students and "collective members respectively of the institute upon the same "conditions and terms (until otherwise provided as aforesaid) as "prevailed in the existing institute, save as provided in clause 15 "hereof."

"15. Each member shall be entitled to the use after his name "of the initials following, that is to say: For an honorary "member, Hon.M.Inst.F.; for a fellow, F.Inst.F.; for a member, "M.Inst.F.; for an associate member, A.M.Inst.F.; for a student, "Student Inst.F.; and no member of any other grade may use "any abbreviations or title which include the institute's initials. "The fellows, members and associate members shall alone be "entitled to describe themselves as chartered fuel technologists; "but any person so qualified, in using that description after his "name, shall place it after the designation of the class in the "institute to which he belongs, stated in accordance with the "authorized abbreviated forms. The use of the words chartered "fuel technologist without the qualifying initials will not be "authorized."

"16. The qualifications, method and terms of admission, "privileges and obligations including the expulsion or suspension "of corporate members and of non-corporate members of each "of the above-named classes respectively shall be such as the "bye-laws for the time being of the institute shall direct, but "the corporate members only shall have the right to vote."

"17. The council shall alone have power to decide conclusively respecting each person proposed for or seeking admission "to any class of membership or seeking transference from one "class of membership to another of the institute whether he has "or has not fulfilled such conditions as are applicable to his "case."

"19. The corporate members, or the majority of such "members present in person and voting at any duly convened "special general meeting with respect to which notice has been "given of the matters to be taken into consideration thereat shall "have power from time to time to make such bye-laws of the "institute as to them shall seem requisite and convenient for "the regulation, government and advantage of the institute, its "members and property and for the furtherance of the objects "and purposes of the institute, and from time to time revoke, "alter or amend any bye-law or bye-laws theretofore made so "that the same be not repugnant to these presents, or to the "laws and statutes of this Our Realm Provided that no such "bye-law, revocation, alteration or amendment shall take effect "until the same has been allowed by the Lords of Our Privy "Council, of which allowance a certificate under the hand of "the clerk of Our Privy Council shall be conclusive evidence."

The by-laws of the Institute of Fuel, so far as relevant, provided as follows: Under the heading "Privileges of Members"

"47. All members shall have notice of and may attend and "speak at all general meetings and special general meetings, but "corporate members only may vote at such meetings."

"48. Each corporate member, associate, student, or collective "member not in arrear with his subscription for more than three "months, and each honorary member shall be entitled to receive "a copy of the current issue of the journal of the institute."

Under the heading "Professional Conduct of Corporate "Members When Engaged in an Advisory or Consultative "Capacity" it was provided by by-law 50:

"Every member of any class in so far as he shall be "engaged or employed in any advisory or consultative capacity, "shall observe and be bound by the following regulations:—

"(a) He shall act strictly in a fiduciary manner in relation "to his clients, and his charges to such clients shall constitute "his only remuneration in connexion with such work, except as "provided by paragraph (d) of this bye-law.

"(b) He shall not accept any trade commissions, discounts,

" allowances, or indirect profit in connexion with the work upon " which he is engaged.

" (c) He shall not, without disclosing the fact in writing to " his clients, be a director or member of, or a shareholder in, " or act as agent for, any contracting or manufacturing company " or firm or business with which he may have occasion to deal " on behalf of his clients, or have any financial interest in such " a business.

" (d) He shall not receive, directly or indirectly, any royalty, " gratuity, or commission on any patented or protected article " or process used on work which he is carrying out for his clients, " unless such royalty, gratuity, or commission has been autho- " rized in writing by those clients.

" (e) He shall not in any circumstances improperly solicit " advisory or consultative work, either directly or by an agent, " nor shall he pay, by commission or otherwise, any person who " may introduce clients to him.

" (f) He shall not be the medium of payments made on his " clients' behalf to any contractor, or business firm, unless " specially so requested in writing by his clients, but shall only " issue certificates or recommendations for payment by his " clients.

" Any alleged breach of these regulations which may be " brought before the council, properly vouched for and supported " by evidence, shall be investigated, and if proved, shall be dealt " with by the council, either by expulsion of the offender from " the institute under the procedure of bye-law 51, as far as it " applies, or in such other manner as the council may think fit."

Michael Rowe Q.C. and *F. A. Amies* for the Institute of Fuel. On the true construction of its charter the Institute of Fuel is a society "instituted for purposes of science exclusively" and is entitled to the benefit of section 1 of the Scientific Societies Act, 1843. The sole object of the institute is stated in paragraph 7 (a) of the charter and is the promotion of fuel technology. It is not denied that fuel technology is an applied science, but the respondents contend that other objects are included in paragraph 7 of the charter, with the result that the object of the institute is not exclusively the promotion of fuel technology. It is submitted that this is not so, and that sub-paragraphs (b) to (h) inclusive of paragraph 7 are merely ancillary to sub-paragraph (a). In particular, it is objected for the respondents that sub-paragraph (d) is a distinct object, providing for the promotion of the interests of the members of the institute, and that paragraph 15, which entitles members of the institute to put initials after their names, confirms this construction. Objection is also taken to by-law No. 50. Similar objections were raised in *Institution of Civil Engineers* v. *Inland Revenue Commissioners* [2] and *Royal College of Surgeons of England* v. *National Provincial Bank Ld.*[3] The fact that membership of a society is beneficial to the members does not mean that the society is not instituted exclusively for purposes of science. The benefit to the members is incidental. The charter and by-laws read as a whole show no other purpose than the promotion of fuel technology. The control of its members is given to the institute to preserve its dignity. The promotion of the interests of its members is not an object of the institute. [Reference was made to *In re Duty on the Estate of the Institution of Civil Engineers* [4]; *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association* [5] and *Inland Revenue Commissioners* v. *Forrest.*[6]]

Maurice Lyell Q.C. and *Harold J. Brown* for the respondents. The history of this body before the grant of its charter is a relevant consideration. The original company was formed to interest the public in fuel technology and to put a new branch of knowledge before them. The second branch of sub-paragraph (a) of paragraph 7 is not a charitable object. In the *Civil Engineers'* case [7] the society in question was not concerned with promoting civil engineering amongst the public. There is a distinction in principle between one who adds to knowledge and one who exploits new knowledge. The latter purpose is not an exclusively scientific activity. When the charter is looked at as a whole, it appears that, in addition to its scientific object, the institute has the independent object of promoting the interests of its members. The motive for the grant of the charter may be considered: see *per* Lord Normand in the *Royal College of Surgeons'* case.[8] [Reference was made to *In re Duty on the Estate of the Institution of Civil Engineers.*[9]]

Michael Rowe Q.C. in reply. Looking at the charter as a

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[2] [1932] 1 K.B. 149; 47 T.L.R. 466.

[3] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

[4] (1888) 20 Q.B.D. 621.

[5] [1949] 1 K.B. 434; 65 T.L.R. 183.

[6] (1890) 15 App.Cas. 334; 6 T.L.R. 456.

[7] [1932] 1 K.B. 149.

[8] [1952] A.C. 631, 641.

[9] 20 Q.B.D. 621.

C. A.

1954

INSTITUTE OF FUEL *v.* MORLEY.

whole the object of the institute is the promotion of fuel technology, not the promotion of fuel technologists.

Cur. adv. vult.

December 15. The following judgments were read.

EVERSHED M.R. The Institute of Fuel is a body corporate incorporated by royal charter in the year 1946. It occupies certain offices and other premises at 18, Devonshire Street, Marylebone, and claims in the present proceedings to be entitled to exemption from rates as being a body " instituted for purposes of science . . . " exclusively " within the meaning of section 1 of the Scientific Societies Act, 1843. This claim was rejected both by the local valuation court for North-West London and by the Lands Tribunal. From the decision of the tribunal the institute now appeals to this court.

The scientific purpose for which alone, according to its case, the Institute of Fuel was " instituted " was that of the promotion of fuel technology. The exact character and scope of fuel technology were not explained to us; but, from the terms of the royal charter, it is clearly concerned with the efficient and economical use of fuel of various kinds, and it is not in dispute that fuel technology is an " applied science," and, therefore, " science " within the scope of the Act of 1843. The sole question, which was debated before the Lands Tribunal and which has been debated before us, is whether the Institute of Fuel was instituted exclusively for the advancement or promotion of that science.

The question must, in my judgment, depend upon an ascertainment, according to the true interpretation of the charter, of the purposes of the institute: so much appears to me to have been laid down by this court in *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association.*[1] Jenkins L.J., in the course of his judgment in that case, formulated the principles to be applied in answering the question posed in this case as well as in that. He said[2]: " The question whether a particular " society is ' instituted for purposes of science, literature, or the " ' fine arts exclusively ' within the meaning of the section must " be determined by reference to the purposes of the society as " defined by its constitution, rather than the purposes it may

[1] [1949] 1 K.B. 434; 65 T.L.R. 183.

[2] [1949] 1 K.B. 434, 451, 452.

"actually have pursued in practice." And then, after observing that a society might forfeit its privilege under the Act of 1843 by pursuing an activity outside the terms of section 1, even though it was unauthorized, the judge continued: "But, in general, I "think a claim to exemption must stand or fall by reference "simply to the society's authorized purposes, the circumstance "that an authorized purpose has never in fact been pursued "being irrelevant."

It becomes, accordingly, necessary to refer to the charter of the institute. Paragraph 7 states the purposes of the institute, and is as follows: [His Lordship read paragraph 7, sub-paragraphs (a) to (h), and continued:] It is to be observed that, according to the terms of the paragraph, no one of the sub-paragraphs (a) to (g) inclusive is expressed to have any primacy over the others. The final sub-paragraph (h), on the other hand, covers activities "incidental or conducive to the attainment of the above objects *or any of them*." Though, no doubt, the object or purpose stated in the first sub-paragraph (a) would, upon a natural reading of the language, be expected to relate to the most significant of the institute's objects or purposes, it does not seem to me legitimate, as a matter of construction, to regard the contents of sub-paragraphs (b) to (g) inclusive as not being objects or purposes at all, but as constituting merely incidents of the first-named object, means towards its achievement or consequences flowing from its pursuit; unless these other objects and purposes are by their nature of such a character as to be substantially incapable of being otherwise effected. If this is a correct approach to the problem, then, in my judgment, the question will be found to turn on the arguments submitted to us upon the meaning and effect in the general context of the charter of sub-paragraph (d). Does that sub-paragraph mean and have the effect that the furtherance of the interests of members of the institute, as professional men practising fuel technology, is an object or purpose of the institute distinct and collateral, even though relatively subsidiary, to the most important object or purpose specified in the first sub-paragraph? If so, then, in my judgment, according to the principles above mentioned, the institute fails to qualify for the exemption claimed. The valuation court and the Lands Tribunal so determined, and I am for my part not persuaded that they were wrong.

In formulating the question as I have done, I have reflected the language used in judgments and speeches in other and similar cases, particularly in the two cases *Institution of Civil Engineers* v. *Inland Revenue Commissioners*,[3] and *Royal College of Surgeons of England* v. *National Provincial Bank Ld.*[4] In the former of those cases the question was of exemption from income tax, and in the latter the question was whether the appellant college was a " charity " within the scope of the preamble to the Statute of the First Elizabeth. The purposes or objects of both bodies—the Institution of Civil Engineers and the Royal College of Surgeons—have more than once been under consideration in the courts. As a result of the two cases cited it may, in my judgment, now be taken as established that each body (and, in the case of the Institution of Civil Engineers, notwithstanding the earlier decision of *Regina* v. *Institution of Civil Engineers* [5]) should be treated as instituted for purposes of science exclusively within the meaning of the Scientific Societies Act, 1843. Mr. Rowe, for the appellants, in the present case contended that the Institute of Fuel should be no less privileged. But, in my judgment, the facts relating to the Institute of Fuel are in certain essential respects different from the facts relating to the Institution of Civil Engineers and to the Royal College of Surgeons.

Before I expand that statement, I make some references to the judgments in this court in the *Civil Engineers'* case.[6] The passages which I desire to quote were made in reference to the question whether the Institution of Civil Engineers was " established for charitable purposes only "; but they are, in my view, equally applicable (mutatis mutandis) to the question with which in this case we are concerned.

Lord Hanworth M.R. said [7]: " As Rowlatt J. has said, there " may be a charitable institution for the relief of sickness, and " incidental advantages can be gained by a subscriber to the " funds, without the institution losing its character; but if there " is an object, e.g., the promotion of the profession in addition " to the promotion of science that is collateral and not merely " incidental, the result is that the institution cannot be described " as established for charitable purposes only."

Lawrence L.J., at the beginning of his judgment, stated that the question was whether the institution was established for charitable purposes only, and proceeded [8]: " The answer to this

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[3] [1932] 1 K.B. 149; 47 T.L.R. 466.

[4] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 894.

[5] (1879) 5 Q.B.D. 48.

[6] [1932] 1 K.B. 149.

[7] Ibid. 161.

[8] Ibid. 167, 170.

"question depends upon whether the institution is established "solely for the advancement of the science of civil engineering (an "admittedly charitable purpose), or whether one of the purposes "for which it is established is to benefit civil engineers in order "to enable them to practise their profession to greater advantage." The Lord Justice quoted and proceeded to apply the well-known language of Lord Macnaghten in *Forrest's* case [9]: "It cannot I think be doubted that the institution has raised "the standard of the profession, and that to a civil engineer it is "of advantage and probably of pecuniary advantage to be a "member. But is that result the purpose of the society, or is it "an incidental, though an important and perhaps a necessary "consequence of the way in which the institution does its work "in the pursuit of science?"

Finally, Romer L.J. said [10] of certain language which he had quoted from A. L. Smith L.J.: "The emphasis here laid upon "the difference between an object that, although subsidiary to the "main object of a society, is nevertheless distinct from it, and "an object that is merely a means to the end of carrying out the "main object, was repeated when the case came before the House "of Lords." After quoting the same passage from Lord Macnaghten's speech in *Forrest's* case,[11] which Lawrence L.J. had cited, he said [12]: "But if the advantage to the members is "not the purpose of the society, but merely an incidental consequence of the way in which it promotes science, then it seems "to me that the society was established for 'the promotion of "'science' only, unless I have misunderstood the meaning of "the word 'only' as used in section 37 of the Income Tax Act."

In the *Royal College of Surgeons'* case [13] the leading speech on the part of the majority of the House was that of Lord Morton of Henryton. The noble Lord referred with approval to the judgments in the *Civil Engineers'* case.[14] He quoted also the passage which I have already twice mentioned from Lord Macnaghten's speech in *Forrest's* case,[15] which he treated as entirely applicable to the case he had to determine with the necessary substitution for the Institution of Civil Engineers and the science of civil engineering of the Royal College of Surgeons and the science of surgery.

Applying the tests so formulated and expressed, the Court of

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[9] (1890) 15 App.Cas. 334, 354.

[10] [1932] 1 K.B. 149, 174.

[11] 15 App.Cas. 334, 354.

[12] [1932] 1 K.B. 149, 176.

[13] [1952] A.C. 631.

[14] [1932] 1 K.B. 149.

[15] 15 App.Cas. 334, 354.

Appeal in the one case, and the House of Lords in the other, decided in favour of the Institution of Civil Engineers and the Royal College of Surgeons respectively. But in each case it was a fact, to my mind, of the highest significance that there was but one single object or purpose. In the *Civil Engineers'* case [16] that single object (contained in a recital in the society's original charter) was: " The general advancement of mechanical science " and more particularly for promoting the acquisition of that " species of knowledge which constitutes the profession of a " civil engineer, being the act of directing the great sources of " power in nature for the use and convenience of man." There was no doubt that civil engineers derived real and material benefit from their membership of the institution, including a right (closely comparable to that possessed by members of the Institute of Fuel in the present case) to place certain initials after their names, for which specific provision was made in the supplemental charter of the institution. It was the presence of these advantages for the members that led Rowlatt J. to hold that the institution was not established for charitable purposes only. But, in the view of all the members of the Court of Appeal, the enjoyment of these advantages was an incident and the consequence of the institution's activity. Their attainment was not an object or purpose of the institution. Its purpose remained the single purpose already quoted. Thus Lawrence L.J. said [17]: " Bearing in mind that the " original charter of 1828 clearly states the only purpose for " which the institution was established, and that this purpose has " never been added to or varied by any of the supplemental " charters, and further bearing in mind that the House of Lords " has decided that this purpose is for the general advancement " of the science of civil engineering, it follows in my judgment " that the institution is established for a charitable purpose only, " notwithstanding that it is of advantage to a civil engineer in his " profession to be a member of the institution, this result not " being a purpose for which the institution was established but " being incidental to and consequent upon the way in which the " institution carries out the charitable purpose for which alone it " was established."

So in the case of the Royal College of Surgeons, the sole object, according to its charters (and again it only appeared as a recital) was " . . . the due promotion and encouragement of the study " and practice of the . . . art and science " of surgery. The real question had been whether the use of the words "and practice" imported into the statement of the objects or purposes of the college that of the promotion of the professional advantage of surgeons. The majority of the House thought not, but were of opinion that the significance of the phrase "study and practice" lay in a reference to "the acquisition of knowledge and skill in "surgery both by abstract study and by the exercise of the art "in the dissecting room and the anatomy theatre" (*per* Lord Normand [18]). So the House of Lords decided, as the Court of Appeal had decided in the *Civil Engineers'* case,[19] that the professional advantage of the members of the society was in substance not an object or purpose, but a consequence. "I "think," said Lord Morton of Henryton,[20] "that the promotion "of the interests of practising surgeons is 'an incidental, though "'an important and perhaps a necessary, consequence' of the "work of the college in carrying out its main object, the promotion and encouragement of the study and practice of the art "and science of surgery." No doubt, because the professional advancement of surgeons was a consequence, and a necessary and also (I have no doubt) a welcome and desired consequence, of the pursuit of the stated object or purpose, so the college in pursuing the latter was in a sense pursuing also the consequential advantages. But the question is (in the present case), for what objects or purposes was the body corporate "instituted"? And if, upon a fair construction of its charter, it appears that it was instituted with the object or purpose—that is, the distinct or direct object or purpose—of pursuing or achieving an end not within the scope of section 1 of the Act of 1843, then, though that object or purpose be not the main object and be relatively of a subsidiary character, in my judgment the privileges of the Act cannot be had.

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[16] [1932] 1 K.B. 149.

[17] Ibid. 171.

I return, then, to the Institute of Fuel's charter and to paragraph 7 thereof in particular. It is at least clear, upon the face of it, that the statement of objects or purposes in the present case is very widely different indeed from the corresponding statements in the cases of the *Civil Engineers* [21] and the *Royal College of Surgeons*.[22] Each of the sub-paragraphs (a) to (g) inclusive of paragraph 7 states, prima facie as a matter of construction, a distinct object or purpose. Moreover, the sub-paragraphs, after the first, do not relate to wide general matters so as, on that account, to lend themselves to interpretation as ancillary to the first or main object. (See, for example, *Stephens* v. *Mysore Reefs* (*Kangundy*) *Mining Co. Ld.*[23]) On the contrary, each of the sub-paragraphs (b) to (g), inclusive, relates to a distinct and precise subject-matter. What, then, does the paragraph mean? Mr. Lyell, for the respondents, submitted that the first sub-paragraph, (a), was itself composed of two distinct parts, comprehending two distinct objects, namely, (i) the study, both on academic and empirical lines, of "fuel technology," that is, of the better and more efficient use of fuels: an object which he conceded to be "scientific"; and (ii) the persuasion of users of fuel of all kinds to put into practice the result of the studies made by the institute and its members, an object which he contended was altogether more mundane and commercial in character and not properly "scientific" within the meaning of the statute.

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[18] [1952] A.C. 631, 641.

[19] [1932] 1 K.B. 149.

[20] [1952] A.C. 631, 659.

[21] [1932] 1 K.B. 149.

[22] [1952] A.C. 631.

The language of sub-paragraph (a) is undoubtedly elaborate and at least lends itself to the view that they are two distinct "ends" or objects. Having regard to the decisive significance which I attach to sub-paragraph (d), it is unnecessary for me to express a conclusion on Mr. Lyell's submission on sub-paragraph (a). I am prepared to assume (without deciding) that the sub-paragraph does not of itself do more than indicate that the study of fuel technology is to be pursued not only as an academic matter, an "end in itself," but also with a view to the public benefit. I am prepared also to assume that sub-paragraphs (b) and (c) are (like paragraphs (e), (f) and (g)) fairly consistent with exclusively "scientific" activities. To my mind, the real question is of the meaning to be given to sub-paragraph (d). It was upon this sub-paragraph, particularly when read with other parts of the charter and the by-laws made thereunder, that Mr. Lyell's argument was mainly concentrated. According to that argument, sub-paragraph (d) contemplated and stated as a distinct object or purpose the creation of a body of persons with a recognized status as skilled advisers in the science or art of the efficient utilization of fuel and with high professional standards—in other words, the object of enhancing the standing of, and otherwise benefiting, fuel technologists, members of the institute.

I have come to the conclusion that this submission is justified. The words of the sub-paragraph are far from clear, particularly the concluding language "by requiring standards of knowledge "and experience which can be approved." The question may be asked: "approved by whom and for what purpose?" Does this language intend no more than that the members of the institute should be of a quality best calculated to promote the advancement of what I have assumed to be the exclusively "scientific" objectives comprehended in sub-paragraph (a)? I have been unable to give so restricted a meaning to the sub-paragraph. In my judgment, the second part of the first sub-paragraph (which I have assumed does not of itself point to a distinct non-scientific object in that sub-paragraph) nevertheless throws a significant light on sub-paragraph (d) and supports the view that, by that sub-paragraph, is intended the enhancement of the standard and prestige of fuel technologists as professional men. The tribunal relied also on paragraphs 15, 16 and 19 of the charter as lending, in their context, further support to this view. In my judgment, paragraph 19 is, of these, the most significant, giving power, as it does, to the institute members to make by-laws ". . . for the "regulation, government and advantage of the institute, its "members and property, and for the furtherance of the objects "and purposes of the institute. . . ." It is not, in my view, legitimate to dismiss the ordinary significance of this language by saying that the paragraph is merely verbose. It is, of course, true that by-laws made by the members (and requiring the approval of the Privy Council) could not enlarge the objects of the institute. The question, however, is of the meaning and intention of paragraph 7 (d); and paragraph 19 throws, to my mind, significant light on that question. The by-laws bound up with the charter are those made as contemplated by paragraph 20 of the charter and may therefore be reasonably expected to reflect its intention. By-law No. 50 owes its existence and authority, in my view, to the provisions I have quoted in paragraph 19 of the charter; and it is plainly directed to the standing and prestige of members of the institute—not so as thereby to improve their contribution to scientific inquiry, but as professional men. To quote but one example, paragraph 50 (e) of the by-laws reads: "He shall not in any circumstances improperly solicit advisory "or consultative work, either directly or by an agent, nor shall "he pay, by commission or otherwise, any person who may "introduce clients to him."

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[23] [1902] 1 Ch. 745; 18 T.L.R. 327.

There is one matter to which Mr. Lyell referred, and which I think to be of some significance and to point in the same direction. "Fuel Technology" as a defined branch of science is of modern origin. I do not, of course, mean that it is the less important and valuable on that account. But it would be at least natural in such a case to have special regard to the position of the practitioners in the art, to the new profession of fuel technologists. And in the document annexed to the case it is stated that the Institute of Fuel "resulted from a merger of the "Institution of Fuel Technology and the Institution of Fuel "Economy Engineers." The presence of the second party to the merger may well account for the emphasis, which I think is to be found in the charter, on the position of members of the chartered institute.

I have found the case a difficult one—as those who were concerned with them found the other cases to which I have referred. My difficulties have been increased by the fact that Jenkins L.J., whose judgment I have had the advantage of reading in advance, has reached the contrary conclusion to my own. But for the reasons which I have attempted to state, I think that the Institute of Fuel have failed to make good their claim for exemption; and I would dismiss the appeal.

JENKINS L.J. This is an appeal by way of case stated from a decision of the Lands Tribunal (Mr. Erskine Simes Q.C.), affirming a decision of the local valuation court, to the effect that the appellant Institute of Fuel is not entitled in respect of its premises, 18, Devonshire Street, London, W.1, to the exemption from rates accorded by section 1 of the Scientific Societies Act, 1843, to "any society instituted for purposes of science, "literature, or the fine arts exclusively" and fulfilling certain other conditions prescribed by the section, the purposes relevant in the present case being those of science.

As appears from the summary contained in the stated case of the facts proved or admitted before the Lands Tribunal, the institute fulfils all the conditions of exemption required by the Act of 1843, apart from the primary condition as to its purposes, and further fulfils the last-mentioned condition, to the extent that it is instituted for purposes of science within the meaning of the Act. The sole question in issue in the present appeal is, therefore, whether the institute, being a society instituted for purposes of science, is instituted for such purposes "exclusively" within the meaning of the Act.

Claims by various bodies or societies to exemption from rates under this Act, or from duty under the Customs and Inland Revenue Act, 1885, s. 11, by virtue of the exemption accorded by subsection (3) of that section to "property which or the income "or profits whereof, shall be legally appropriated and applied . . .

"for the promotion of education, literature, science, or the fine "arts," or from income tax by virtue of the exemption accorded by section 37 (1) (*b*) of the Income Tax Act, 1918, to "a body of "persons established for charitable purposes only" have been considered in many reported cases.

It will be seen that the word "exclusively" in the exemption given by section 1 of the Act of 1843, while matched by the synonym "only" in the exemption given by section 37 (1) (*b*) of the Income Tax Act, 1918, has no counterpart in the exemption given by subsection (3) of section 11 of the Act of 1885. This suggests that a given institution might, as regards its purposes, qualify for exemption under the Act of 1885, while failing to do so under the Act of 1843, and a comparison of *Regina* v. *Institution of Civil Engineers*,[24] where the Institution of Civil Engineers was held not to qualify for exemption under the Act of 1843, with *Inland Revenue Commissioners* v. *Forrest*,[25] where the same institution was held to qualify for exemption under the Act of 1885, might at first sight appear to support this conclusion. It must now, however, be taken as settled that *Regina* v. *Institution of Civil Engineers*,[26] so far as it proceeded on the ground that the Institution of Civil Engineers was not instituted for purposes of science exclusively, is to be considered as overruled by *Forrest's* case.[27] (See *Institution of Civil Engineers* v. *Inland Revenue Commissioners*.[28]) It is, therefore, a justifiable assumption that, if the question now arose for decision de novo, the Institution of Civil Engineers would be held to be instituted "for purposes "of science exclusively," just as it was held in *Institution of Civil Engineers* v. *Inland Revenue Commissioners*,[28] to be "established for charitable purposes only." It follows that the Institution of Civil Engineers can properly be taken as affording an example of a society instituted for purposes of science exclusively within the meaning of the Act of 1843, with which comparison may be made in considering the claim of the appellant institute in the present case to be a society so instituted.

In the comparatively recent case of *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association* [29] an attempt was made in this court to state the principles to be applied in answering the question whether a given society is instituted for purposes of science exclusively. I will briefly recapitulate what was then said: (i) Science for the present purpose includes applied, as well as pure or speculative science. (See *per* Lord Macnaghten in *Inland Revenue Commissioners* v. *Forrest*.[30]) Nothing turns on this in the present case, as it is not in dispute that fuel technology, the advancement of which is claimed by the appellant institute to be its exclusive object, is " science " within the meaning of the Act of 1843.

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[24] 5 Q.B.D 48.

[25] 15 App.Cas. 334.

[26] 5 Q.B.D. 48.

[27] 15 App.Cas. 334.

[28] [1932] 1 K.B. 149, 153, 170, 177.

[29] [1949] 1 K.B. 434; 65 T.L.R. 183.

(ii) The question whether a particular society is " instituted " for purposes of science . . . exclusively " within the meaning of the section must be determined by reference to the purposes of the society as defined by its constitution, rather than the purposes it may actually have pursued in practice. (See *per* Lord Campbell in *Regina* v. *Cockburn*,[31] where he said: " . . . " but are the purposes so described and explained *exclusively* " scientific? We are bound to look at all the purposes for which " the society is professedly founded, and to which, without a " breach of trust, its funds may be applied.")

(iii) As observed by Lord Watson in *Inland Revenue Commissioners* v. *Forrest*[32]: " . . . it is not sufficient compliance " with the plain language of the Act that a society be established " chiefly for the purpose of promoting science, literature, or the " fine arts. One or other of these must be its exclusive object; " so that an institution which also contemplated some other, " though altogether subsidiary object, could not claim the benefit " of the exemption."

(iv) A distinction is, however, to be drawn between the purposes of a society and the means adopted to attain those purposes. Thus a society, having for its purpose the promotion of science, is not disqualified from exemption merely because its authorized activities include, as means of attaining that end, activities which, considered as ends in themselves, would be ends other than the promotion of science.

A point of particular importance in the present case is the bearing of the third and fourth of these principles on the question whether provisions in the constitution or rules of a given society designed to confine membership to persons attaining suitable degrees of proficiency or distinction in the science which it is formed to promote, to impose proper standards of professional conduct on its members, or to authorize the use by its members of descriptions denoting their membership or particular category of membership, calculated as such provisions are to enhance the prestige of the society and to cause membership of it to redound to the personal credit and advantage of its members, will have the effect of defeating a claim by the society to be "instituted "for purposes of science exclusively" within the meaning of the Act of 1843, as distinct from being instituted partly for the promotion of science and partly for the personal advantage of its members.

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[30] 15 App.Cas. 334, 353, 354.

[31] (1852) 16 Q.B. 480, 490.

[32] 15 App.Cas. 334, 348

This question was discussed at length by this court in *Institution of Civil Engineers* v. *Inland Revenue Commissioners*[33] in relation to the claim of that institution to exemption from income tax under section 37 (1) (*b*) of the Act of 1918, as a society established for charitable purposes only. Lord Hanworth M.R. said this[34]: "I confess that I have a difficulty in attaching the "same weight as was given to it by the commissioners and the "learned judge to the fact that members of the institution can "attach letters as suffixes to their names. The requirement of the "institution whereby its members have to possess an adequate "qualification does not appear to me to connote an advantage, "amounting to a collateral purpose in the sense above. That "its members should bring a certain knowledge and capacity for "learning to the institution seems only to confirm its purpose "of the general advancement of mechanical science and "knowledge."

Lawrence L.J. said[35]: "The main contention on behalf of "the Crown in the present case is that one of the purposes for "which the society was established was to benefit civil engineers "in their profession, and that therefore the institution was not "established for charitable purposes only. The answer to this "contention is, I think, to be found in the following passages "of Lord Macnaghten's judgment in *Forrest's* case[36]: 'It "'cannot I think be doubted that the institution has raised the "'standard of the profession, and that to a civil engineer it is "'of advantage and probably of pecuniary advantage to be a "'member. But is that result the purpose of the society, or is "'it an incidental, though an important and perhaps a necessary "'consequence of the way in which the institution does its work "'in the pursuit of science?' and the answer to this question is "summed up by Lord Macnaghten as follows: 'The action of "'the society may incidentally benefit the profession to which "'its members belong—I have no doubt that is so—but I agree

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[33] [1932] 1 K.B. 149.

[34] Ibid. 162.

[35] Ibid. 170, 171.

[36] 15 App.Cas. 334, 354, 356.

" ' with the Master of the Rolls in thinking that " that which " ' " this society does is something higher and larger than the " ' " mere education of students and others for the profession " ' " of civil engineer." ' In view of the contention that the " institution is not established for the promotion of science only, " because under the supplementary charter of 1922 a civil " engineer is entitled to advertise the fact that he is a member " of the institution by placing the initials M.I.C.E. after his " name or otherwise, the following passage in the judgment of " Fry L.J. in *Forrest's* case[37] is peculiarly apposite: ' It has " ' been pressed upon us that the membership in this society is " ' of pecuniary value to engineers, and I have no doubt that " ' that is the case; but the observation does not appear to me " ' to go far. It is obvious that membership in many bodies " ' formed for the cultivation of science is of pecuniary value to " ' certain classes of persons. A fellowship in the Royal Society " ' is undoubtedly of pecuniary value to medical men, to " ' engineers, chemists, and others; nevertheless it is plain that " ' the object of that society is the promotion of science.' "; and at the conclusion of his judgment he said this: " . . . it follows " in my judgment that the institution is established for a " charitable purpose only, notwithstanding that it is of advantage to a civil engineer in his profession to be a member of " the institution, this result not being a purpose for which the " institution was established but being incidental to and consequent upon the way in which the institution carries out the " charitable purpose for which alone it was established."

Romer L.J., after referring to *Regina* v. *Institution of Civil Engineers*,[38] said this[39]: " For the moment I am merely " concerned with the meaning that was given to the word " ' exclusively,' a word, of course, that is synonymous with " ' solely ' or ' only.' It is clear that some such meaning must " be attributed to these words. Where a society is instituted " for a charitable purpose, it is obvious that the membership of " the society may confer upon its holder personal advantages of " considerable value to him in his profession or in his social " standing. He may, for instance, have an exclusive right to " affix to his name a certain designation, and will be known " to the public as a person belonging to the society. He may " have to observe disciplinary rules laid down with a view to

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[37] (1888) 20 Q.B.D. 621, 631.

[38] 5 Q.B.D. 48.

[39] [1932] 1 K.B. 149, 172.

"ensuring that he does not bring discredit upon other members "of the society. But in such cases, although the securing of "such advantages to the members may in a sense be regarded "as one of the objects of the society, such object is merely "concomitant or incidental to the real object of the society; "and if that real object be charitable, the society is established "for charitable purposes only."

Romer L.J.[40] quoted this passage from the speech of Lord Macnaghten in *Overseers of the Savoy* v. *Art Union of London*[41]: "'... it has been held in several cases that where a "'contributor derives personal advantage from being a member "'of a society, the society, though formed for one of the purposes "'favoured by the Act, cannot be considered as formed for that "'purpose "exclusively." This mode of construction may be "'admissible when the society is not incorporated, and its "'purpose, consequently, is not defined by charter or statute. "'When, however, that is the case, it seems to confuse the "'purpose of the society with the object of individual members "'in joining it.'", and continued: "This passage in Lord "Macnaghten's speech not only throws light upon the meaning "of the word 'exclusively.' It seems to indicate that he would "have been of opinion that the Institution of Civil Engineers "was established exclusively for the purposes mentioned in its "charter. But this is not a matter of inference to be drawn "from Lord Macnaghten's speech in the *Art Union* case.[41] It "was, in my opinion, actually so decided by the House of Lords "in *Forrest's* case,[42] to which I have already referred for another "purpose."

Romer L.J., after referring to *Regina* v. *Institution of Civil Engineers*,[43] said this[44]: "It had been argued for the appellants "in that case that when the charter and the by-laws of the "institution were looked at, it appeared that the main, the "primary, object of the institution was to promote the interests "of the profession of engineers, and not to increase scientific "knowledge. For the purpose of dealing with this argument, "Lord Watson considered in detail the charter and the by-laws, "and, having done so, said this[45]: 'The mere fact that member-"'ship is confined to those who are actively engaged, and have "'attained some degree of eminence, in the profession, does

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[40] [1932] 1 K.B. 149, 174.

[41] [1896] A.C. 296, 313; 12 T.L.R. 377.

[42] 15 App.Cas. 334.

[43] 5 Q.B.D. 48.

[44] [1932] 1 K.B. 149, 175.

[45] 15 App.Cas. 334, 350.

" 'not militate against the object of the institution being the " 'advancement of engineering science; because they are really " 'the only persons possessing the knowledge and practical " 'experience requisite for the efficient promotion of that object'; " and a little later: 'I do not doubt that membership is accom- " 'panied with a certain amount of prestige which may prove to " 'be of service to the member in his professional career; but " 'I believe that the same result would attend membership of " 'any society which effectively promoted a branch of science " 'intimately connected with the profession or business in which " 'the member was engaged.' In conclusion he said: 'I have " 'accordingly come to the conclusion that the income of the " 'institution is, in fact, applied, not for the professional ends " 'of individuals, but for "the promotion of science" in the " 'proper sense of the words . . .' "

Then Romer L.J., after quoting the passage from Lord Macnaghten's speech in *Forrest's* case [46] to which Lawrence L.J. had already referred, said this [47]: " But if the advantage to the " members is not the purpose of the society, but merely an " incidental consequence of the way in which it promotes science, " then it seems to me that the society was established for 'the " 'promotion of science' only, unless I have misunderstood the " meaning of the word 'only' as used in section 37 of the Income " Tax Act."

In the later case of *Royal College of Surgeons* v. *National Provincial Bank Ld.*[48] the House of Lords adopted and applied the reasoning in *Forrest's* case [49] and *Institution of Civil Engineers* v. *Inland Revenue Commissioners* [50] in holding, by a majority, that the Royal College of Surgeons was a charitable institution, because its main purpose was the charitable one of promoting and encouraging the study and practice of the art and science of surgery, and the advantages derived by practising surgeons from its activities were merely incidental to that main purpose.

It remains to apply the law, as above stated, to the objects of the appellant institute.

This institute was incorporated by royal charter in the year 1946. Its avowed objects are set out in paragraph 7 of the charter. [His Lordship read paragraph 7, and continued:] The language of these provisions is somewhat diffuse and obscure, but given that fuel technology is a form of applied science (which is not in dispute), I cannot find in them any object that is not directed either to the advancement of this science or to purposes purely ancillary to such advancement, or, in other words, purposes which, though expressed as substantive objects, are in truth no more than means whereby the advancement of the science in question is to be brought about.

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[46] 15 App.Cas. 354.

[47] [1932] 1 K.B. 149, 176.

[48] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

[49] 15 App.Cas. 334.

[50] [1932] 1 K.B. 149.

Paragraph 7 (a) is, as I read it, directed to the advancement of fuel technology and nothing else. Mr. Lyell, for the respondents, contended that it comprised two objects the first being the advancement of fuel technology and as such purely scientific, and the second being to persuade users of fuel to put into practice the methods evolved or perfected in pursuance of the first, which is a social or economic object as distinct from a scientific one. I cannot agree. The sub-paragraph, as a matter of construction, prescribes one object only, namely, the advancement of fuel technology, and goes on to say, in effect, that this object is to be pursued not merely as an end in itself (that is, for the purpose of increasing the sum of academic or laboratory knowledge pertaining to this science) but also in order that the fuel-using public may benefit from the new and improved methods of fuel utilization, which the advancement of the science by the institute may be expected to produce. In other words, the institute is not only to increase this department of scientific knowledge, but also to make known to the world and available for public use the knowledge thus gained. The rest of sub-paragraph (a), which relates to industrial and scientific research investigation and experimental work in the economical treatment and application of fuel, is, I think, clearly no more than ancillary to the advancement of fuel technology.

Paragraph 7 (b) provides for activities (in particular the holding of meetings and the publication of a technical journal) in which any scientific society would normally engage within the field of the particular science which it was formed to promote, and the clause introduced by the words "and generally" makes it plain that these activities are to be pursued purely as means to the end of advancing fuel technology and as ancillary to that end. There was some discussion about the meaning of the phrase "as its status requires." Does this mean the status (that is, importance) of the science of fuel technology, or does it mean the status (that is, standing) of the institute as "The Institute of

"Fuel incorporated by royal charter"? I think it must mean the latter, but either way I do not think that it affects the purely ancillary character of paragraph 7 (b).

Passing over paragraph 7 (c) as clearly no more than ancillary, I come to paragraph 7 (d), which is one of the provisions held by the Lands Tribunal to defeat the appellant institute's claim to exemption. It is true that this provision is in terms included amongst the substantive objects, but its purpose is plain, and is simply to ensure that membership of the institute shall be confined to persons who have attained a suitable degree of proficiency in the field of fuel technology. This is one of the matters classed as merely ancillary in the authorities to which I have referred, and I do not think its ancillary character is altered by the inappropriate placing of paragraph 7 (d) amongst the substantive objects of the institute. It does not make sense as a substantive object, which it clearly is not.

I think that the various objects set out in the remaining sub-paragraphs (e) to (h) of paragraph 7 are likewise all of a purely ancillary character, and no point was raised on any of them by Mr. Lyell. Accordingly, so far as its avowed objects are concerned, that is to say, its objects as set out eo nomine in paragraph 7 of the charter, I am of opinion that the institute is entitled to succeed.

Reference was also made to paragraph 6 of the charter, which, by way of exception from the prohibition of the receipt of any profit by members, provided that nothing therein contained should prevent the giving of privileges to members of the institute; to paragraph 15, which authorized the use by the several classes of members of distinguishing initials after their names; to paragraph 16, which provided that (inter alia) the qualifications, privileges and obligations, including liability to expulsion or suspension of members, should be such as the by-laws for the time being of the institute should direct; and to paragraph 19, which provided for the making of by-laws "for the regulation, "government and advantage of the institute, its members and "property" with a proviso that no by-law or alteration, revocation or amendment of any by-law should have effect until allowed by the Privy Council.

Paragraph 15 can be shortly disposed of by saying that this matter of the use of initials is again one of the very matters classed as merely ancillary in the authorities referred to above.

I attach no importance to the general references to the privileges of members in paragraphs 6 and 16 and to the advantage of members in paragraph 19. As appears from paragraphs 16 and 19, such privileges were to be defined by by-laws; and, as appears from paragraph 19, such by-laws require the sanction of the Privy Council in order to be effective, and while they are to be "for the regulation, government and advantage of the institute, "its members and property," they must not be repugnant to the charter. I cannot regard these provisions in regard to privileges as adding to the objects of the institute a distinct or collateral object in the shape of conferring privileges on members, and I think that they should be construed as referring to privileges of an incidental description. As to the phrase "for the regulation, "government and advantage of the institute, its members and "property," I do not think it can fairly be construed as authorizing by-laws for the advantage of the members, as distinct from the institute of which they are members. Moreover, inasmuch as the privileges and advantage of members referred to in these paragraphs depend on the by-laws, and by-laws can only be made or altered with the sanction of the Privy Council, I think that the argument based on paragraphs 6, 16 and 19 must be judged by reference to the existing by-laws and not by reference to the possible effect of future by-laws. Accordingly, I cannot agree with the Lands Tribunal that there is anything in any of these paragraphs of the charter to defeat the appellant institute's claim.

I turn now to the by-laws, which I can consider quite briefly. Nos. 47 and 48, headed "Privileges of Members," show the modest character of the privileges enjoyed by the members under the by-laws now in force. They are (No. 47) to have notice of and attend and speak, but, unless a corporate member, not to vote, at all general and special general meetings, and (No. 48) to receive a copy of the current issue of the journal of the institute.

Importance was attached by the Lands Tribunal to No. 50 headed "Professional Conduct of Corporate Members when "engaged in an Advisory or Consultative capacity," and the tribunal held that this by-law, in conjunction with paragraphs 7 (d), 15, 16 and 19 of the charter, defeated the claim to exemption.

I have already expressed my dissent from the tribunal's views as to the effect of these paragraphs of the charter. I also dissent from the tribunal's view as to the effect of by-law 50. I cannot see that this by-law does anything more than require members, to whom it applies, to observe disciplinary rules laid down with a view to ensuring that they do not bring discredit upon other members of the institute. While such rules are to the advantage of members of the institute, the securing of such advantage, though in a sense one of the institute's objects, is to be regarded as merely ancillary to the real object of the institute: see *per* Romer L.J. in *Institution of Civil Engineers* v. *Inland Revenue Commissioners.*[51]

We were referred to a number of other provisions in the by-laws. I do not propose to go over them in detail, but will content myself with saying that I can see nothing in any of those provisions which is in any way inconsistent with the conclusion that the appellant institute is instituted for purposes of science exclusively within the meaning of the Act of 1843, construed in the light of the authorities to which I have referred, or which provides any material ground for distinguishing the case of this institute, so far as the scientific nature of its purposes is concerned, from that of the Institution of Civil Engineers.

Accordingly I would allow this appeal.

BIRKETT L.J. (after stating the facts). The only question in the present appeal from the decision of the Lands Tribunal is whether the Institute of Fuel is instituted exclusively for the purposes of science within the meaning of the Act of 1843. That question is to be answered in the present appeal by finding out what are the purposes of the institute as defined in its royal charter and its by-laws made under the provisions of the charter.

The decision of the Court of Appeal in *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association* [52] makes it quite clear that in general, to use the words of Jenkins J., " a claim to exemption must stand or fall by reference simply " to the society's authorized purposes." The objects and purposes for which the institute was founded are set out in paragraph 7 of the royal charter.

It has never been contended that the institute was not founded for the purposes of science at all; the contention of the respondents has been, and is, that it was not instituted for the purposes of science exclusively. To this end, Mr. Lyell, for the respondents, examined the provisions of the charter in some detail. He submitted that paragraph 7 (a) of the charter disclosed two purposes, the one admittedly a purpose of science in the words " to promote, foster, and develop the general advancement of " the various branches of fuel technology as an end in itself," and the other not a purpose of science in the words "and as a "means of furthering the more scientific and economic utilization "of fuel of all kinds for industrial, commercial, public, agricultural, domestic, transport and/or other purposes, and to "promote, assist, finance and support such industrial and scientific research, investigation and experimental work in the "economical treatment and application of fuel as the institute "may consider likely to conduce to those ends, and to the benefit "of the community at large."

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[51] [1932] 1 K.B. 149, 173.

[52] [1949] 1 K.B. 434, 452.

It is not easy to say with precision what those last words of paragraph 7 (a) are designed to cover. It was submitted on behalf of the institute that the words of paragraph 7 (a) disclosed one object only, and that object was exclusively scientific—to advance the science of fuel technology and to make the fruits of scientific research more widely available.

For the respondents it was said that an examination of the charter revealed three purposes at least for which the institute was instituted: (a) To encourage and stimulate study and research in order that fuel of all kinds should be the better adapted for public use. (b) To persuade users of fuel of all kinds to make better use of the fuel they employed in their industrial and commercial undertakings by following the advice of the Institute of Fuel given as a result of the scientific investigation. (c) To create a body of persons with high professional standards and recognized status to act as skilled advisers in the science of using fuel of all kinds to its maximum efficiency.

In my opinion, the second part of paragraph 7 (a) of the charter discloses a purpose that cannot be said to be a purpose of science exclusively. The purpose of science set out in the earlier part of the paragraph is to be used as a means of causing fuel of all kinds to be more widely used in every kind of commercial undertaking, and to be used more scientifically and economically. The industrial and scientific research, investigation and experimental work which the institute is to finance and assist is to be such as the institute may consider likely to conduce to the purpose thus expressed. No doubt this is a most laudable purpose, and the fuel-consuming public will have the benefit of it. But the question in this appeal is not whether the purposes of the institute are laudable, but whether they are exclusively scientific. Parliament has recently emphasized the great importance of technology in the life of the nation, and has granted very large sums of money for the scientific study of the practical and

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industrial arts. But it is necessary to observe that this appeal is not concerned with the great importance of technology (which nobody doubts), nor with the support which ought to be given to its advancement, but with the rather mundane question whether the Institute of Fuel qualifies to be relieved of the payment of rates upon its premises because its purposes are exclusively scientific.

I am of the opinion that the second part of paragraph 7 (a) of the charter discloses a purpose more properly described as a commercial purpose or a social purpose rather than a scientific purpose. It is quite true that by paragraph 5 of the charter it is provided that "The institute shall not carry on any trade or "business or engage in any transaction with a view to the "pecuniary gain or profit of the members thereof." But it is quite plain from by-law No. 50 that it is contemplated that members of the institute will be engaged by clients in an advisory or consultative capacity, and the more extensive use of fuel of all kinds by the public cannot fail to be of advantage to the members by increasing their opportunities of serving clients in such capacities. By paragraph 19 of the charter the members of the institute at a special general meeting shall have power to make by-laws as to them shall seem requisite and convenient for the regulation, government and advantage of the institute, its members and property, and for the furtherance of the objects and purposes of the institute. This paragraph, too, would seem to contemplate the advantage of the members as a distinct consideration which the members of the institute in special general meeting assembled were empowered and entitled to consider.

In these circumstances, it seems difficult to say that the objects of the institute were for purposes of science exclusively. The members were fuel technologists, and naturally interested in the use of fuel of all kinds by the public generally, and whilst, no doubt, the scientific research was essential to the production of the more economical and efficient commodity with which the institute was concerned, the wide use of the commodity by the public was a distinct object of the members.

In a pamphlet which explains the purposes of the institute, it is stated that the funds for acquiring the premises of the institute were raised "from individual and collective members and from "supporting interests amongst the firms and other organizations "with which members are associated." This, it seems to me, lends some colour to the view I have stated that the second part of paragraph 7 (a) is in some degree, at least, a commercial purpose as distinct from a scientific one.

The Lands Tribunal made no decision on the construction of paragraph 7 (a) of the charter which was contended for by the respondents but, in my opinion, the paragraph does disclose a purpose that cannot be described as exclusively scientific.

But I think that there is another ground on which the respondents succeed. Paragraph 7 (d) of the charter sets out a further distinct object of the institute in these words: "To uphold the "status of members of the institute by holding or prescribing "examinations for candidates for election, and by requiring "standards of knowledge and experience which can be approved."

Paragraph 15 of the charter provides for the use of certain initials which certain classes of members may use and certain descriptions which they may apply to themselves.

Paragraph 16 provides for the qualifications of members and for the obligations of members, including the liability to expulsion or suspension to be determined by the by-laws which can be made by virtue of paragraph 19 of the charter.

The only by-law relied on by the respondents was by-law No. 50, which is headed: "Professional Conduct of Corporate Mem-"bers when engaged in an Advisory or Consultative capacity" and concerns the professional conduct of members and has no concern with the scientific attainments of the member at all. Reading paragraphs 7 (d), 15, 16 and 19, and by-law No. 50 together, it seems plain that a distinct and avowed object of the institute was to establish and uphold the professional status of fuel technologists, who should have become members of the institute, and cannot be classed as a purpose of science in any way whatever.

I regard it as a matter of importance that paragraph 7 (d) does set out separately and distinctly this particular object of the institute. And it is perfectly reasonable to suppose that the founders of the institute were well aware of the great advantages which the institute could confer on the members in their professional capacity, and were anxious to see those advantages made real. If the purpose of the founders was merely to secure that nobody should be a member of the institute unless he had reached a certain standard in the science of fuel technology, it would have been a simple thing to have said so. But the founders went out of their way to set out quite clearly this particular provision as a separate object, and I find it impossible to say that it was a purpose of science. The same point, I think, was in the mind of Lord Macnaghten in his speech in *Inland Revenue Commissioners* v. *Forrest.*[53] That was a case under section 11 of the Customs and Inland Revenue Act, 1885, and the exemption from duty in subsection (3) was in favour of " Property which . . . " shall be legally appropriated and applied for . . . the promotion " of . . . science." Lord Watson said[54]: " In order to bring a " society within section 1 of the Act of 1843, two statutory " requisites must concur. The society must be one instituted " exclusively for purposes of science, literature, or the fine arts; " and it must also be supported, in whole or in part, by annual " voluntary contributions. I do not think the legislature intended " that fixed yearly payments which individuals agree to make " in consideration of their being admitted to a society and allowed " to share in its management (there being a legal obligation to " make such payments as long as their membership continues), " should be regarded as voluntary contributions within the " meaning of the Act. But the contrary was decided, after some " hesitation, and to that circumstance the difficulties subsequently encountered in construing the exemption appear to me " to have been mainly due. Then it is not sufficient compliance " with the plain language of the Act that a society be established " chiefly for the purpose of promoting science, literature, or the " fine arts. One or other of these must be its exclusive object; " so that an institution which also contemplated some other, " though altogether subsidiary object, could not claim the benefit " of the exemption." And Lord Macnaghten said[55]: " Probably " the founders of the society were not insensible of the advantages " which such an institution was likely to confer upon its members " in their professional capacity. That would have been a formidable objection if the language of the Act of 1885 had been the " same as that of the Act of 1843. But under the Act of 1885, " in the case of a scientific institution, the only question is " whether the property sought to be charged is legally appropriated and applied for the promotion of science. If it is, it " seems to me that the exemption must hold good, although the " institution to which the property belongs may serve another " purpose as well."

In *Institution of Civil Engineers* v. *Inland Revenue Commissioners*[56] Romer L.J. said: " Lord Macnaghten, indeed, intimated " that if the language of the Act of 1885 had been the same as

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[53] 15 App.Cas. 334.
[54] Ibid. 348.
[55] Ibid. 354.
[56] [1932] 1 K.B. 149, 175.

"that of the Act of 1843, the fact that the founders of the society "were not insensible of the advantages which such an institution "was likely to confer upon its members in their professional "capacity would have been a formidable objection. But he did "not have to consider, and did not consider in fact, the question "whether such an objection would have been successful. In my "opinion, however, it necessarily follows, from what he and "Lord Watson did decide, that the word 'exclusively' or "'solely' would have made no difference. It had been argued "for the appellants in that case that when the charter and the "by-laws of the institution were looked at, it appeared that the "main, the primary, object of the institution was to promote the "interests of the profession of engineers, and not to increase "scientific knowledge. For the purpose of dealing with this "argument, Lord Watson considered in detail the charter and "the by-laws, and, having done so, said this[57]: 'The mere "'fact that membership is confined to those who are actively "'engaged, and have attained some degree of eminence, in the "'profession, does not militate against the object of the institution "'being the advancement of engineering science; because "'they are really the only persons possessing the knowledge and "'practical experience requisite for the efficient promotion of "'that object'; and a little later: 'I do not doubt that "'membership is accompanied with a certain amount of prestige "'which may prove to be of service to the member in his "'professional career; but I believe that the same result would "'attend membership of any society which effectively promoted "'a branch of science intimately connected with the profession "'or business in which the member was engaged.' In conclusion "he said: 'I have accordingly come to the conclusion that the "'income of the institution is, in fact, applied, not for the "'professional ends of individuals, but for "the promotion "'"of science" in the proper sense of the words; and in that "'view, I entertain no doubt that such income is "legally "'"appropriated" within the meaning of the Act, because the "'purposes to which it is applied are the same with those "'prescribed by the charter of incorporation.'"

It is not contended in this case that the primary purpose of the institute is to advance the interests of the members; it is not to be denied that membership of a scientific institution must necessarily add to the prestige of the members; but what is said is that the founders of the institute were careful to include in the charter a distinct and separate object, not as something concomitant or incidental to the real object of the society, not as something which would be the means to the end of carrying into effect the main object, but as an end and object in itself. The "upholding of the status" of members of the institute was not, in my opinion, an incidental consequence of the way in which the institute promoted and fostered science, but was a clearly stated object of the institute, and although it might be regarded as a subsidiary object, it was, nevertheless, an object which defeats the claim of the institute that it was instituted for the purposes of science exclusively.

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[57] 15 App.Cas. 334, 350.

I would dismiss the appeal and uphold the decision of the Lands Tribunal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Philip Conway, Thomas & Co.; Sharpe, Pritchard & Co.*

B. A. B.

BURGESS v. FLORENCE NIGHTINGALE HOSPITAL FOR GENTLEWOMEN AND ANOTHER.

1954
Oct. 29.
1955
Feb. 7, 8, 9.
Devlin J.

[1953 B. 3256.]

Fatal Accidents Acts—Damages—Loss of income—Husband's claim for loss of wife as dancing partner—Whether recoverable—Husband's claim for loss of wife's contribution to their joint living expenses—Whether benefit conferred on husband which he could recover—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *s.* 2.

The plaintiff and his wife were professional dancing partners before and after their marriage in 1952, their income being derived from demonstration fees and prize money won in competitions. Their joint fees were paid to the husband in cash, which was put into a drawer and either of them took from the drawer whatever money was necessary for any particular purpose. In January, 1953, the plaintiff's wife died as a result of the negligence of a surgeon. The husband claimed damages under the Fatal Accidents Act, 1846, for, inter alia, the loss of his wife as a dancing partner and for the loss of her contribution to their joint living expenses. It was essential to the plaintiff's business to find a suitable dancing partner. This he had been unable to do, and as a result had suffered loss of income:—

Held, (1) that the benefit, to qualify under the Act, had to be one which arose from the relationship between the parties, and although the relationship of husband and wife was a convenient and usual incident of such a dancing partnership, in essence the partnership was a business one, with the marriage relationship superimposed on the dancing partnership; accordingly, there were no services rendered by the wife to the husband and no benefit arising in the dancing partnership that could properly be attributed to the relationship of husband and wife; *Sykes* v. *North Eastern Railway Co.* (1875) 44 L.J.C.P. 191; 32 L.T. 199 applied; but (2) when a husband and wife with either separate incomes or a joint income were living together and sharing their expenses, then each, by the fact of the sharing, was conferring a benefit on the other which arose from the relationship of husband and wife; and, accordingly, there was a benefit which came within the Fatal Accidents Act, and was therefore recoverable by the husband.

Action.

The plaintiff, Robert William Burgess, started dancing as an amateur in 1942. In that year he met his future wife who became his dancing partner for amateur purposes. On July 1, 1948, they started dancing professionally, entered competitions for money prizes, gave demonstrations and started a dancing school. In September, 1952, they were married. In January, 1953, Mrs. Burgess was admitted to the Florence Nightingale Hospital for Gentlewomen for a minor operation. She was attended by the second defendant, Dr. Emily Catherine Lewis, who gave her an injection consisting of a solution which purported to be a proper solution for a local anaesthetic, but which contained a lethal proportion of adrenalin. Mrs. Burgess died a few minutes afterwards. At that time the plaintiff and his wife were nearing the peak of their professional status. For a year or more they had been among the top line demonstrators and they were expected to win, either in 1953 or 1954, one or both of the two principal championships in the professional dancing world in England. Their prospects would have been good if they had won either of the championships. The death of Mrs. Burgess was a serious loss to the plaintiff professionally and there was very little prospect of his being able to find another partner who would put him back in the position which he had held at the time of his wife's death. The couple's joint earnings from demonstration fees and prize money were paid in cash to the plaintiff, and all the money was put into a drawer at their home which might contain anything from £20 to £200 at a time. Either of them took from the drawer whatever was necessary for any immediate purpose.

The plaintiff claimed as the widower and legal representative of his wife under the Fatal Accidents Act, 1846,[1] and the Law Reform (Miscellaneous Provisions) Act, 1934, as well for the benefit of himself, Brenda Baker, a daughter of the deceased, and Elizabeth Drinkwater, the widowed mother of the deceased, as for that of the estate of the deceased. It was alleged that the death of the wife was caused by the negligence of the servants or agents of the hospital, the first defendants, including the second defendant, in negligently failing to exercise reasonable care, skill and competence in the treatment of the deceased and in particular failing to administer a proper local anaesthetic.

The first defendants denied that the second defendant was their servant or agent. The second defendant admitted negligence, but disputed the dependency, loss and damage alleged in the statement of claim. The case against the first defendants was discontinued on the first day of the hearing of the action.

Anthony A. H. Marlowe Q.C. and *Andrew Phelan* for the plaintiff. The question is whether the plaintiff was dependent on his wife. It is submitted that he was dependent on her and that for their success and joint income they were dependent on each other. The husband's own pecuniary benefit is lost by the wife's pecuniary loss. If they earned together £x, he does not now earn half of £x, he has lost the whole. He cannot recover for his own loss, but it is submitted that he can recover his wife's pecuniary value, which is at least 50 per cent. of what they earned together. Reliance is placed on *Condon* v. *Great Southern and Western Railway Co.*[2] *Sykes* v. *North Eastern Railway Co.*[3] is distinguishable from the present case on its facts. In that case a father paid his son 33s. a week for working for him, and therefore when the son was killed the father suffered no pecuniary loss. In the present case there is no question of the plaintiff employing his wife. The money earned by the plaintiff and his wife was pooled and used for the benefit of the household; the plaintiff received thereby a pecuniary benefit from his wife and as a result of her death he has suffered loss; by her existence the deceased enabled her husband to earn more and to that extent also she gave him a pecuniary benefit. [Reference was made to *Franklin* v. *South Eastern Railway Co.*[4]]

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[1] Fatal Accidents Act, 1846: ". . . "whensoever the death of a person "shall be caused by wrongful act, "neglect, or default, and the act, "neglect, or default is such as would "(if death had not ensued) have "entitled the party injured to maintain an action and recover damages "in respect thereof, then and in "every such case the person who "would have been liable if death "had not ensued shall be liable to "an action for damages, . . .

"S. 2. Every such action shall be "for the benefit of the wife, husband, "parent, and child of the person "whose death shall have been so "caused, . . . and in every such "action the jury may give such "damages as they may think proportioned to the injury resulting from "such death to the parties respectively for whom and for whose "benefit such action shall be brought; ". . ."

[2] (1865) 16 Ir.C.L.Rep. 415.

[3] (1875) 44 L.J.C.P. 191; 32 L.T. 199.

Condon v. *Great Southern and Western Railway Co.*[5] is on all fours with the present case except that here one has the relationship of husband and wife instead of mother and son. In that case there was a reasonable expectation that the deceased son would have rendered services which would have been of assistance to his mother, and enabled her to earn more money. That matter could be taken into account in assessing damages under the Act. [Reference was also made to *Taff Vale Railway Co.* v. *Jenkins*[6] and *Feay* v. *Barnwell.*[7]]

A. P. Marshall Q.C. and *Michael Hoare* for the second defendant. The plaintiff has brought himself within the relationship laid down by the Act but he must show the reasonable expectation of pecuniary benefit from the continued life: Pollock C.B. in *Franklin* v. *South Eastern Railway Co.*[8] It is not necessary to show the actual earnings and/or contribution at the time of death. It is conceded that the rendering of services can found a reasonable expectation of pecuniary benefit; but the reasonable expectation must arise from the relationship of the deceased and the parties for whom the action is brought: *Sykes* v. *North Eastern Railway Co.*[9] The facts in *Sykes'* case[9] are in substance the same as those of the present case. The plaintiff is here saying that because of the loss of assistance from his wife he is now unable to earn an income. As Brett J. said in *Sykes'* case,[9] the son was being paid a full amount of wages and therefore there was no evidence of pecuniary benefit accruing to the father from the relationship. The matter is summarized in *Berry* v. *Humm & Co.*[10] by Scrutton J., who obviously accepts the interpretation placed on *Sykes'* case[11] by the defendant. One must see from the evidence what pecuniary benefit, if any, the plaintiff received, not out of the partnership, but out of the relationship between himself and his wife. It must be proved by the plaintiff that the actual financial benefit arose out of the marriage relationship and not from anything external.

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[4] (1858) 3 H. & N. 211.

[5] 16 Ir.C.L.Rep. 415.

[6] [1913] A.C. 1; 29 T.L.R. 19.

[7] [1938] 1 All E.R. 31.

[8] 3 H. & N. 211, 214, 215.

[9] 44 L.J.C.P. 191.

[10] [1915] 1 K.B. 627, 632; 31 T.L.R. 198.

[11] 44 L.J.C.P. 191.

At common law in a civil action one cannot make the death of another person the basis of an action for damages. If the dancing team had consisted of three members, A, B and C, and A and B were married, if A died through the fault of a third party, it is common ground that C could not recover damages, but if the plaintiff is right then B could recover. It is submitted that neither B nor C could recover.

The services rendered by the plaintiff's wife were not services rendered to the plaintiff, but were joint services rendered to third parties from whom they both received remuneration; and that is not a matter dealt with by the Act.

Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ld.*[12] gives the picture which has to be considered in assessing damages in such cases. It is conceded that if out of the wife's earnings she made some direct contribution to the family fund which gave benefit to the plaintiff, that would fall within the Act. [Reference was made to *Mankin* v. *Scala Theodrome Co. Ld.*[13] and *Baker* v. *Bolton.*[14]] It was suggested that *Condon's* case[15] and *Feay* v. *Barnwell*[16] in some way depart from the general proposition.

[DEVLIN J. I do not think that they do.]

Then it is not necessary to deal with them, and *Sykes'* case[17] remains the basis of the law on this point. In the present case the relationship is quite plainly a business relationship. The fact that they became husband and wife shortly before the wife's death is fortuitous. The relationship between the plaintiff and the deceased was contractual, not by marriage, but by ordinary contract. It started on July 1, 1948, when the deceased decided to become a professional dancing team with the plaintiff. It appears that they each earned 50 per cent. of their joint income. The marriage was in September, 1952. If she had died in August, it is submitted that there would have been no cause of action. On the plaintiff's own evidence the marriage brought about no difference and no financial advantage flowed from the deceased to the plaintiff arising out of the marriage relationship. It was the same financial arrangement as existed before. A fortiori the plaintiff's claim for reduced earnings of his own cannot be said to spring from the marriage at all. It springs from the business relationship quite apart from marriage. It follows from *Sykes'* case[17] that the plaintiff cannot recover compensation in respect of his own loss of earnings, which is a claim arising out of partnership. The 50 per cent. division of earnings meant that the deceased was being remunerated to the full value of her services and that the plaintiff was not getting more than he would have done from an ordinary business relationship. Therefore in so far as the plaintiff is claiming for his own reduced earnings it does not form a proper claim under the Act. In so far as the claim is based on contribution by the deceased to the joint family fund from which the plaintiff derived a financial benefit, the burden of proving it is on the plaintiff and the evidence of contribution is so unsatisfactory as not to discharge the burden of proof.

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[12] [1942] A.C. 601, 617; 58 T.L.R. 240; [1942] 1 All E.R. 657.

[13] [1947] K.B. 257; 62 T.L.R. 728; [1946] 2 All E.R. 614.

[14] (1808) 1 Camp. 493.

[15] 16 Ir.C.L.Rep. 415.

[16] [1938] 1 All E.R. 31.

[17] 44 L.J.C.P. 191.

Marlowe Q.C. in reply. Every one of these cases depends on a question of fact. *Sykes'* case[17] turned on its limited facts, which established a master and servant relationship. That case was commented on in *Hull* v. *Great Northern Railway Co. of Ireland.*[18] The judge was saying that even if there was a contract, if there was some pecuniary benefit, that was sufficient. It is immaterial to say here that if the plaintiff had not been married he could not recover. That is conceded. The whole basis of the case is that the plaintiff and the deceased were married.

Devlin J. In this case liability is admitted, but the assessment of damages raises two unusual questions under the Fatal Accidents Act, 1846. The principal claimant is the husband, and he claims in respect of the loss of his wife. The husband and wife were professional dancing partners, and it is clear that their joint ability to earn an income greatly exceeded the ability of either of them individually; neither of them individually could have expected to earn as much as they both did together, dancing as a couple in competitions and in giving demonstrations, and so on; and accordingly, the main head of the husband's claim is in respect of the damage to his own position, which has been caused to him by the loss of his wife as a dancing partner.

The second point which arises is that the husband and the wife shared their joint earnings. The wife was therefore beneficially entitled to a separate income. They not only shared their earnings, but they also shared their living expenses, and the question is to what extent in those circumstances can the husband be said to be dependent on the wife, so that the loss of the wife loses for him a benefit which can be translated into money and for which he can be given compensation under the Fatal Accidents Act.

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[17] 44 L.J.C.P. 191.

[18] (1890) 26 L.R.Ir. 289, 294.

[His Lordship stated the facts and made the following assessments of damages: (1) value to the plaintiff of his wife (*a*) as a dancing partner, £2,500; (*b*) as a wife, £1,000; and (*c*) for her contribution to their joint income, £1,000. (2) Loss suffered by Brenda Baker, £350. (3) Loss suffered by Elizabeth Drinkwater, £300. His Lordship continued:] The first and most important point, of the two matters of law, is the claim for the loss of the wife as a dancing partner. That of course must depend, in the last analysis, on the terms of the Fatal Accidents Act, 1846, under which the claim is made, and the question is whether it is a claim which is allowable under that Act or not. It is not put as a claim which arises at common law; but I think, before one turns to the Act, it is convenient to consider the reason why it does not arise under the common law, because then one will see what necessary limitations must be read into the rather wide and general provisions of the Fatal Accidents Act. It is clear that the plaintiff has in fact sustained an injury; he has sustained a loss. Why, then, is it not recoverable in law? The answer is, I think, because the law must necessarily limit the scope within which it can allow recovery. Whenever a man dies, if he is a man of an active type, it has repercussions, great or small, on all those with whom he has previously been concerned. It may redound to their financial advantage, or it may redound to their financial disadvantage. If a man who is employed as a departmental manager, for example, at £3,000 a year, is suddenly killed, someone may step into his shoes and get a larger income, and derive a benefit from his death, while someone else, perhaps a secretary whom he particularly liked, might be thrown out of employment and might have difficulty in getting other employment at the same salary, and might thus lose a sum of money. All those losses, though they do not seem quite so direct as the loss to the husband in this case, are in fact still within the same category. They are a little more remote because of the close connexion between the husband and the wife as dancing partners, but they are within the same category, and the law does not allow it, because if it did there would be no end to the compensation which would have to be paid as a result of some perhaps quite small accident which could not have been foreseen by the wrongdoer.

That principle has been recently very clearly stated in the House of Lords in *Best* v. *Samuel Fox & Co. Ld.*[1] Lord Goddard said[2]: "It may often happen that an injury to one "person may affect another; a servant whose master is killed "or permanently injured may lose his employment, it may "be of long standing, and the misfortune may come when he "is of an age when it would be very difficult for him to obtain "other work, but no one would suggest that he thereby acquires "a right of action against the wrongdoer. Damages for per-"sonal injury can seldom be a perfect compensation, but where "injury has been caused to a husband or father it has never "been the case that his wife or children whose style of living "or education may have radically to be curtailed have on that "account a right of action other than that which, in the case "of death, the Fatal Accidents Act, 1846, has given." Then Lord Morton of Henryton said[3]: "My Lords, with one excep-"tion to which I shall shortly return, it has never been the law "of England that an invitor, who has negligently but uninten-"tionally injured an invitee, is liable to compensate other persons "who have suffered, in one way or another, as a result of the "injury to the invitee. If the injured man was engaged in a "business, and the injury is a serious one, the business may "have to close down and the employees be dismissed; a daughter "of the injured man may have to give up work which she "enjoys and stay at home to nurse a father who has been "transformed into an irritable invalid as a result of the injury. "Such examples could easily be multiplied. Yet the invitor is "under no liability to compensate such persons, for he owes "them no duty and may not even know of their existence."

That being the general principle of common law, it is in the light of that that one must interpret the words of the Fatal Accidents Act, 1846, which are extremely short and wide. The material words are in section 2 and are simply these: "Every "such action shall be for the benefit of the wife, husband, "parent, and child of the person whose death shall have been "so caused, . . . and in every such action the jury may give such "damages as they may think proportioned to the injury resulting

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[1] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

[2] [1952] A.C. 716, 731.

[3] Ibid. 734.

"from such death to the parties respectively for whom and for "whose benefit such action shall be brought; . . ."

If one were merely to apply those wide words this case, I think, would fall within them, because it is an injury which resulted from death, but those wide words have been restricted by a series of decisions which really make a complete exegesis; the respect in which Mr. Marshall submits that they must be cut down is that the loss must be a loss which arises from the relationship which is specified in the section.

Let me take, for example, the case of a man in the prime of life, who takes into partnership a young man, and within two or three years the senior partner is killed. The junior partner's prospects may be grievously injured; he may not have had time to establish himself in the good graces of the clients of the firm, and the result may be that a lot of work goes elsewhere. At common law there would be no claim by the junior partner. Can it make any difference that the senior partner is a father who has taken a son into the family business? The relationship, in such a case as that, is purely incidental, and Mr. Marshall submits that that is also the position in the present case. The loss claimed is claimed in that case qua junior partner, not qua son, and to allow the loss under the Fatal Accidents Act merely because of the incidental factor that the senior and the junior partner happen to be father and son, would be wrong. Therefore one must cut down the wide words of the Act by reading into them an implication that the loss must result from one or other of the relationships which are specified in the section.

Mr. Marshall relies not only on general considerations, but also on one particular authority, which I think takes him a good deal of the way, if not the whole of the way. Mr. Marlowe, on the other hand, relies on other authorities as showing that the case relied on by Mr. Marshall does not establish all that he wants. I think it is clear that the authorities establish that if the benefit arises out of the relationship, it need not be a monetary benefit, but it can be services rendered which can then be translated into money; if a relation, out of filial duty or any other motive that arises from relationship, renders services to the plaintiff which he gives either free or at less than the market rate, the loss of those services is something which can be translated into cash and is recoverable under the Act.

The first authority which I have to consider is *Franklin* v.

South Eastern Railway Co.[4] That was a case where a father earned 3s. 6d. a week by carrying up coals to the wards of a hospital where he was employed, but as he was not in fact himself capable of carrying up the coals, his son carried them up for him, so that he could earn the 3s. 6d. a week. The son was killed. There one has the sort of case in which one relative is assisting another in the performance of his work, as Mr. Marlowe says that the wife was assisting the husband here; but it is plain that what was there being given to the father was 3s. 6d. a week. If the son had taken the 3s. 6d. a week and handed it over to the father for his upkeep, that contribution would unquestionably have been within the Act; the value of the services rendered is equally within the Act. The son was, by reason of the relationship, rendering services free to his father.

In *Condon* v. *Great Southern and Western Railway Co.*,[5] an Irish case on which Mr. Marlowe also relies, the point was explained in just the same way. There the son was killed, and the mother made a claim, and one of the things that she said in her evidence was[6]: "Michael would be of use to me to assist "me to carry on any business. He would be now nearly as "useful as his father." The judge, who directed the jury, said that they might consider whether, if he were able to earn, he would have helped his mother by those earnings, or, as he said,[6] ". . . if the boy had lived he would have been of some appreciable "and substantial benefit to his mother, by sharing his labour, "and thereby enabling her to earn the more for herself and "her other children. . . ." That direction I take to mean that if the son had continued to live (because of course, under the Act one may consider the prospect of future benefits) he would in fact have worked for his mother in a way which would have enabled his mother to earn more, meaning thereby that he would have worked at less than the usual wages, and by working at less than the usual wages he would have given his mother the benefit of his labour, which would have been reflected in her earnings, just as in the earlier case that I cited the benefit of the son's labour was reflected in the 3s. 6d. a week paid to the father. That was a case, therefore, of services rendered free, or at less than the market rate, by reason of the relationship of mother and son.

Sykes v. *North Eastern Railway Co.*,[7] on which Mr. Marshall relies, was a case where the son assisted his father, and the son was killed. According to the father's evidence he employed his son, and he paid his son 33s. a week as wages. Then he said [8]: "My son used to assist me; his assistance was included "in the 33s. I allowed him to draw so much to pay his wages, "and we used to consult when he came home. I make plans; "I found his advice and assistance of great value; owing to my "son's death I never shall be able to take the contracts that I "did during his lifetime, because I cannot light upon anyone "having the same knowledge that he had."

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[4] (1858) 3 H. & N. 211.

[5] (1865) 16 Ir.C.L.Rep. 415.

[6] Ibid. 416.

[7] (1875) 44 L.J.C.P. 191; 32 L.T. 199.

That claim was disallowed, and Brett J. said [8]: "The "plaintiff gave no evidence of a pecuniary benefit accruing to "him from relationship; the son worked for his father, who "appears to have paid him a full amount of wages." Then Grove J. said [9]: "The plaintiff was bound to prove a benefit "accruing to him from his relationship with the deceased; but "he merely showed that he derived an advantage from a contract "with his son. *Franklin* v. *South Eastern Railway Co.*[10] is "plainly distinguishable; the facts were very different. In that "case the son worked for nothing; here the father paid wages, "the son was servant when he assisted the plaintiff. There "was no evidence that the son was paid less than the usual "wages for a skilled workman. The plaintiff appears to have "paid him the wages which a skilled workman ought to receive. "The pecuniary advantage to the plaintiff did not depend upon "the relationship; the deceased at any time might have left the "employ of the plaintiff, who possibly might have succeeded in "hiring a better workman than his son." That is setting out the principle for which Mr. Marshall contends, the son getting the full amount of the wages, and the loss of benefit arising merely from the loss of a valuable employee, and not from the loss of a son.

Hull v. *Great Northern Railway Co. of Ireland* [11] was cited to me by Mr. Marlowe as qualifying *Sykes* v. *North Eastern Railway Co.*[12] In the *Hull* case [13] Palles C.B. at the beginning of his judgment said: "It is unnecessary to determine whether "there is evidence that the loss, if any, of the plaintiff, accrued "by reason of the relation of mother and daughter which sub-"sisted between her and the deceased. Even were the services "of the deceased rendered in pursuance of a contract, the "reasoning of the judges in *Sykes* v. *North Eastern Railway*

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[8] 44 L.J.C.P. 191, 192.

[9] Ibid. 192, 193.

[10] 3 H. & N. 211.

[11] (1890) 26 L.R.Ir. 289.

[12] 44 L.J.C.P. 191.

[13] 26 L.R.Ir. 289, 293, 294.

"*Co.*[14] seems to leave it still open for consideration whether "the discontinuance, through death, of services which although "contracted for, are of greater value than the price stipulated "for them, may not (if the jury believe that the relationship "between the parties was the motive of the contract) amount "to a pecuniary loss, within Lord Campbell's Act."

I do not think that that qualifies the principle in *Sykes'* case,[14] except in one particular which is not relevant here. The Chief Baron is there, I think, expressly recognizing the principle in *Sykes'* case,[14] that the relationship between the parties must be, as he says in one place, the motive of the contract, or as he says in another place, the loss must accrue by reason of the relation of mother and daughter. All that he is pointing out is this, that that relationship may take effect in two ways; it may induce the relation to give her services free, or it may induce the relation to give her services at less than the market rate, and if she gives them at less than the market rate it is just as much a benefit as if she gave them free, and it is pointed out in *Sykes'* case[14] that the position was the contrary of that.

The last case to which I need refer is a decision of Singleton J., in *Feay* v. *Barnwell*,[15] which is relied on by Mr. Marlowe. In that case the judge allowed as one of the items of loss, the loss to the husband of 10s. a week pension which he got in respect of his wife; that is to say, his pension was 10s. a week larger than would have been his pension as a single man because he was a married man, and when his wife died his pension was reduced by 10s. a week. That, again, was assistance which came from the wife to the husband in the form of income, but again, it is assistance which quite plainly derived from the relationship, for the reason why he got the 10s. was because he was a married man and had a wife, and the 10s. therefore arose from the relationship between himself and his wife.

I think that all those authorities are consistent with the principle which is stated in *Sykes'* case.[16] I think that even without the assistance of those authorities I should have arrived at the same conclusion of principle, and that is that the benefit, to qualify under the Act, must be a benefit which arises from the relationship between the parties; and therefore that is the question which I have to determine in this case. It is important to note that here the wife's services were fully paid for, that is to say, she took her full half-share of the joint earnings. It is not suggested that it was an arrangement particularly beneficial to the man, or that a lady dancing partner would have asked more but for the fact that she was the wife of the other partner.

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[14] 44 L.J.C.P. 191.

[15] [1938] 1 All E.R. 31.

[16] 44 L.J.C.P. 191.

Then the question is: Did the fact that they were earning that joint income arise from their relationship? It was not unconnected with their relationship. I think that the relationship was a very convenient and usual incident of the partnership. It is convenient, of course, if a man and woman are constantly going about together and staying at hotels, and it greatly eases the position, if they can stay as man and wife, and it adds also, as Mr. Marlowe stressed, that element of permanence to what otherwise might be a pure business partnership; but those, in my judgment, are only incidental matters. That, I think, is stressed by the fact that the husband and wife relationship was superimposed upon the partnership; they had been together as professional partners, sharing their income, for years before they were married, and there are in existence in the dancing world dancing partners who are not married, and although, no doubt, the usual thing is to find them married, that is not essential.

I have, therefore, come to the conclusion that there were here no services that were rendered by the wife to the husband, and there was no benefit arising in the dancing partnership, that can properly be attributed to the relationship of the husband and wife. If this claim were to be allowed, then any partner whose prospects were similarly affected by the death of the other, whatever their relationship was, ought logically to be compensated, too.

I turn now to the other head of the claim which Mr. Marshall disputes, and that is the loss by the husband of his wife's contribution to their joint living expenses. Mr. Marshall says that he does not dispute it as a matter of principle; he accepts it as a matter of principle, but he says that it must be strictly proved, and that there is no evidence in this case that the wife did in fact contribute out of her share of the income. I gathered that he would put his case as high as this, that there must be something to show that when the husband, as it is conceded, took the money out of the drawer to pay, shall I say, the monthly instalments of rent, he was taking it from his wife's share in the drawer as well as his own, and that in the absence of that "something" the husband cannot recover. Mr. Marshall conceded that if the wife had kept her own share of the money, and had it paid over to her in notes, and then handed notes over to the husband for the purposes of the establishment, then it would have been something which was assessable.

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GENTLEWOMEN.

Devlin J.

Mr. Marshall puts his objection as one upon the facts, saying that the burden of proof has not been discharged. But I think that in reality his objection is one of principle. As Mr. Marlowe says, if the position had been reversed, and it had been the wife who was here suing by reason of the death of the husband, no one would have thought of contending that at least a half was not paid by the husband. The possibility of Mr. Marshall's contention really only arises because this is a claim in respect of the wife and not of the husband. It is therefore based on the principle that some higher degree of proof must be expected for the assertion that a wife contributes towards the joint expenses than would be expected in the case of a husband. I do not think that under present conditions any such greater burden of proof ought to be imposed, or that there is any presumption one way or the other. No doubt, 50 or 100 years ago, the presumption was that the husband paid all the joint living expenses, and anything that the wife earned was a sort of pin money, which she could keep for herself; but I do not think that that fits the facts of modern married life, and I do not think that it fits the case of the very sensible and ordinary way in which the married couple in this case were in fact carrying on their married life. They were both earning equally, and they both contributed equally, and I think that the wife was just as much contributing to the joint living expenses by the way in which they were discharged, as she would have been if she had kept the money herself and then handed it over to the husband.

No case has been cited to me where what one might call mutual dependence of this sort has been made the subject of a claim under the Fatal Accidents Act, but I see no difficulty about it in principle. It seems to me that when a husband and wife, either with separate incomes or with a joint income to which they are both beneficially entitled, are living together and sharing their expenses, and in consequence of that fact their joint living expenses are less than twice the expenses of each one living separately, then each, by the fact of the sharing, is conferring a benefit on the other. I think that such a mutual benefit clearly arises from the relationship by virtue of which they are living together, namely, the relationship of husband and wife, and accordingly comes within the Fatal Accidents Act.

Judgment for the plaintiff.

Solicitors: *Alwyn Williams; Le Brasseur & Oakley.*

C. J. E.

WRIGHT *v.* WALFORD.

C. A.

1954
Dec. 14, 15, 16.

Evershed M.R., Birkett and Romer L.JJ.

[Plaint No. K. 174.]

Landlord and Tenant—Rent restriction—Landlord by purchase—Protected tenant subsequently granted new tenancy in same house—Whether protection defeated—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch. I, para.* (*h*) (*as amended*).

In January, 1952, the plaintiff, who was the subtenant of part of a house within the Rent Restrictions Acts of which the defendant was the tenant, purchased the freehold reversion. In July, 1952, the plaintiff as landlord served a notice to quit on the defendant but offered him as alternative accommodation that part of the house which he, the defendant, was actually occupying. The defendant surrendered the tenancy of the whole house, accepting a contractual tenancy of the alternative accommodation as from September 29, 1952. In May, 1954, the plaintiff served on the defendant a notice to quit that accommodation and later brought an action claiming possession on the ground that he required the accommodation for occupation by himself and members of his family, and offering a smaller part as alternative accommodation:—

Held, that the plaintiff, having become the tenant's landlord by purchasing the house in 1952, was disabled from obtaining possession by the words stated in parenthesis in paragraph (*h*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 [1]; for although the character and incidents of the relationship of landlord and tenant existing between the plaintiff and the defendant had varied, the relationship was brought into existence by the purchase and had subsisted ever since.

Fowle v. *Bell* [1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668 considered.

Statement of Denning L.J. in *Littlechild* v. *Holt* [1950] 1 K.B. 1, 8; 65 T.L.R. 270; [1949] 1 All E.R. 933 explained.

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[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3: " (1) No order or judgment for " the recovery of possession . . . shall " be made . . . unless the court con" siders it reasonable to make such " an order . . . and either—(*a*) the " court has power so to do under " the provisions set out in the First " Schedule to this Act; or (*b*) the " court is satisfied that suitable alter" native accommodation is available " for the tenant. . . ."

Sch. I, para. (*h*) " the dwelling" house is reasonably required by the " landlord (not being a landlord who " has become landlord by purchasing " the dwelling-house or any interest " therein after July 11, 1931 [this " date being amended in 1938 to " December 6, 1937, and in 1939 for " new control to September 1, 1939]) " for occupation as a residence for " —(i) himself; or (ii) any son or " daughter of his over 16 years of age " . . . Provided that an order . . . " shall not be made . . . on any " ground specified in para. (*h*) . . . " if the court is satisfied that having " regard to all the circumstances of the " case, including the question whether " other accommodation is available for " the landlord or the tenant, greater " hardship would be caused by grant" ing the order . . . than by refusing " to grant it."

C. A.
1954

WRIGHT
v.
WALFORD.

APPEAL from a decision of Judge Glazebrook sitting at Gravesend County Court.

In 1940 the defendant, Arthur Walford, became the tenant of an eight-roomed house within the scope of the Rent Restrictions Acts, known as 11, Darnley Street, Gravesend. In 1948 he sublet the two top floors consisting of three rooms to the plaintiff, Frederick David Wright. In 1952 the plaintiff purchased the freehold reversion, so that thereafter the plaintiff remained the defendant's subtenant in respect of the two top floors, and the defendant occupied as tenant of the plaintiff the remainder of the house, five rooms comprising the basement and ground floor of the premises. On July 16, 1952, the plaintiff landlord served the defendant tenant with a notice to quit, but offered to grant to him a tenancy of the part of the premises actually occupied by him, that is, the five rooms in the two lower floors, if he would surrender his tenancy of the whole house. It was indicated that if the defendant did not accept the offer, proceedings for possession would be taken and the five rooms would be offered as alternative accommodation. The defendant accepted the offer and the agreed terms of the new tenancy were set out in a letter dated September 30, 1952. On May 11, 1954, the plaintiff served a second notice to quit, and on May 26 started proceedings claiming possession of the whole of the accommodation occupied by the defendant, offering as alternative accommodation the rooms already occupied by the defendant, less one room on the ground floor, and claiming that he required the remainder for occupation by himself and his family.

The county court judge, having decided that the alternative accommodation was not reasonably suitable to the needs of the defendant and his family, dismissed the plaintiff's claim for possession, holding that he was disabled from obtaining possession on the ground that he, the plaintiff, required the accommodation for occupation by himself and his family because he had purchased the house after September 1, 1939. The plaintiff appealed.

R. E. Megarry for the plaintiff landlord. The words in parenthesis in paragraph (*h*) of the First Schedule to the Act of 1933 (referred to as the parenthesis) form the first of three hurdles for a landlord who is seeking possession for his own occupation. Even if he surmounts the first, the tenant can defeat the claim for possession if he shows that greater hardship would be caused to him if an order is made than the landlord would suffer if it is refused. Finally, there is the overriding requirement that the court must be satisfied that it is, in all respects, reasonable to make the order. In the present case the sole question is whether the landlord is debarred by the parenthesis, for the county court judge has said that, but for those words, he would have made an order in favour of the landlord.

It is clear that the landlord purchased after the disqualifying date (irrespective of whether the house was subject to new or to old control) and that he purchased subject to the interest of the tenant who is now before the court. At that time, therefore, the parenthesis undoubtedly applied and the sitting tenant was protected as long as his then subsisting tenancy continued. The parenthesis relates to the tenancy, rather than to the tenant and, therefore, when, in 1952, the landlord granted a new tenancy to the tenant the parenthesis no longer applied, since it could no longer be said that the landlord was the landlord of the tenancy subject to which the purchase was made. [Reference was made to *Rogers* v. *Hyde*,[2] and it was pointed out that the tenant here was not, as in that case, deprived of the entire protection of the Rent Acts on the grant of the new tenancy, but that when that happened he lost one scale of his armour.]

The first case involving the construction of "landlord by "purchasing" was *Epps* v. *Rothnie*,[3] though the question at issue in the present case did not arise in that case. The next case, *Fowle* v. *Bell*,[4] is also distinguishable, for there the tenant before the court was not the person who had been the sitting tenant at the time of the purchase.

[EVERSHED M.R. What happens if the sitting tenant at the time of the purchase leaves the premises, but subsequently returns, is granted a tenancy, and resumes occupation; would he still be within the protection of the parenthesis?]

Quoad a new tenancy granted after the purchase, the landlord is landlord by grant, not by purchasing, and, therefore, the parenthesis does not apply. The phrase is "has become landlord "by purchasing" and not "once became landlord by purchasing."

The words "landlord by purchasing" are incapable of interpretation without some expansion; both the interpretation now sought to be put on behalf of the landlord and that put for the tenant involve reading words into the Act. One limb of the opening words of the schedule introduce, admittedly, the idea of a tenant rather than a tenancy ("the ejectment of a tenant"), but the other limb ("the recovery of possession") does not, and so this gives no clear indication as to the proper interpretation of paragraph (*h*). As was said in *Fowle* v. *Bell*,[5] paragraph (*h*) is an enabling provision and, therefore, any ambiguity must be resolved in favour of the landlord. It is inconceivable that the legislature should have intended to confer a sort of personal immunity peculiar to the person who happened to be the sitting tenant at the time of the purchase which he could carry about with him even if he left the premises.

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[2] [1951] 2 K.B. 923; [1951] 2 All E.R. 79.

[3] [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146.

[4] [1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668.

Fowle v. *Bell*[5] decided that "landlord by purchasing" was to be construed in relation to the tenant, rather than to the premises, but the interpretation now being advanced, "landlord "of the tenancy," was not argued and, indeed, in that case it would have made no difference whether "landlord by purchasing" was related to "tenant" or to "tenancy." If the phrase is to be read as "landlord of the present tenant," as was said in that case, the further words "holding under his present title" should be added to avoid the anomalies which did not arise in that case but are apparent in this.

[BIRKETT L.J. Where the sitting tenant at the time of the purchase goes away but afterwards returns and takes a new tenancy, can it not be said that he is a new tenant for the purpose of this provision and cannot rely on it?]

That is an alternative way of putting the landlord's case. The next case in order of date is *Powell* v. *Cleland*[6]; it contains a summary of the earlier cases but is not directly in point in the present case. In *Littlechild* v. *Holt*[7] both the landlord and the tenant at the time of purchase died before proceedings were brought. The landlord seeking possession was the personal representative of the deceased landlord and the tenant before the court was the successor of the deceased statutory tenant, remaining in possession by virtue of section 12 (1) (*g*) of the Act of 1920. In those circumstances it was decided that the tenant was entitled to the protection of the parenthesis. The case deals primarily with the effect of the change in the person of the landlord, and only Denning L.J. delivered a reasoned judgment as to the effect of the change of tenant, though both aspects underlay, and were vital to, the decision. He said[8] that a change of tenant did not break the protection afforded by the parenthesis, but that a

[5] [1947] K.B. 242, 246.

[6] [1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672; [1947] W.N. 304.

[7] [1950] 1 K.B. 1; 65 T.L.R. 270; [1949] 1 All E.R. 933.

[8] [1950] 1 K.B. 1, 8.

change of tenancy would do so, for it was the tenancy which was protected. Birkett L.J. delivered a concurring third judgment [9] and must be taken to have agreed with what Denning L.J. had said, so that the decision on that aspect is binding on this court.

[Birkett L.J. It is difficult in a concurring judgment to say that you agree with most of what has been said. I agreed with the result. The only reasons relevant to the decision related to the landlord.]

[Evershed M.R. The suggestion that the right of a successor under section 12 (1) (*g*) is the same tenancy makes assumptions as to the nature of a statutory tenancy which I am not inclined to make. The right to remain in possession is a personal right derived from the definition of tenant, but it does not follow that there persists in the successor any right derived from the deceased tenant—if any does persist it is not a right of property. The tenant referred to in section 3 of the Act of 1933 includes the successor under section 12 (1) (*g*) of the Act of 1920, so that the fact that he or she is not the original statutory tenant ceases to be relevant for the purposes of paragraph (*h*), not because of paragraph (*h*) but because of section 3. If so, what Denning L.J. said in *Littlechild* v. *Holt* [9] is obiter; may he have been wrong in postulating a right and interest enjoyed by persons in succession?]

The remarks made by Denning L.J. are part of the process of reasoning underlying the decision of the court and cannot, it is submitted, be treated as merely obiter. There had been the change in the person of the tenant and unless both links held the chain of protection would be broken.

Fowle v. *Bell* [10] was before the court in *Littlechild* v. *Holt*,[11] and the conclusion reached shows that the court did not take Scott L.J.'s words [12] literally.

[Evershed M.R. The court was principally concerned with the effect of the death of the landlord, and the application of *Fowle* v. *Bell* [13] did not give rise to any difficulty on that head.]

Both points were vital to the decision reached. *Fowle* v. *Bell* [13] was in point on both.

[Romer L.J. If the protection of the parenthesis is limited to the one tenancy why should a statutory tenant be within its scope if the contractual tenancy ended after the date of purchase, for if he remains in possession as a statutory tenant it cannot be said that he has the same "tenancy"?]

[9] [1950] 1 K.B. 1.

[10] [1947] K.B. 242.

[11] [1950] 1 K.B. 1.

[12] [1947] K.B. 242, 246.

[13] [1947] K.B. 242.

He has not the same "tenancy," but he has all the rights and liabilities which existed under the expired tenancy, and that includes the protection of the parenthesis.

[ROMER L.J. Is it not more accurate to say that the protection of the parenthesis is for the benefit of the tenant?]

If so, when a contractual tenant assigns, the assignee is outside the scope of the protection.

In *Cairns* v. *Piper*,[14] as in *Fowle* v. *Bell*,[15] it made no difference whether "tenancy" or "tenant" was correct, but the judgment of Denning L.J.[16] is of some assistance, as confirming what it is submitted that his Lordship said in *Littlechild* v. *Holt*.[17] [*Newton* v. *Biggs* [18] was also referred to.]

If the formula "landlord by purchasing" relates to the tenancy, rather than to the tenant, the anomaly already referred to in the case where the sitting tenant at the time of the purchase leaves the premises but afterwards returns will not arise. This interpretation is also apposite, and works better than that submitted on behalf of the tenant, in cases where a landlord buys premises subject to a business tenancy and afterwards grants to the person who was the sitting tenant at the time of the purchase a new tenancy permitting him to use part or all of the premises as a dwelling-house. He is, undoubtedly, the same tenant, but it would be wrong for him to be protected by the parenthesis.

[EVERSHED M.R. If the tenancy formula is accepted, a subtenant purchasing the reversion, and taking, as landlord, the two stages of proceedings which have been taken by this landlord, will be able to ride roughshod over the protection afforded by the parenthesis; though maybe this particular landlord would say that the second stage was, in his case, a brilliant and providential afterthought.]

The county court judge was, undoubtedly, afraid that this might be a loophole in the Acts, but the size of the possible loophole should not be exaggerated, bearing in mind that the parenthesis is only one of three obstacles to a landlord who is seeking possession for his own occupation and that a decision in the landlord's favour on this point would merely mean that, subject to the "hardship" test, the county court judge was free to do what he thought reasonable in the particular circumstances. Further, there is, and always has been, a loophole where the tenant is offered alternative accommodation, for, though the substituted premises must necessarily be within the Rent Restrictions Acts, a tenant cannot carry with him the protection which he may have enjoyed in the original premises by virtue of the parenthesis. In *Littlechild* v. *Holt*[19] Denning L.J. said that a voluntary break in the tenancy causes a break in the protection, but it is submitted that he was using voluntary exigetically and not as part of the principle which he was laying down. The tenant often has no option but to accept the offered alternative accommodation, knowing, as in the present case, that proceedings will be taken if he does not do so and that in all probability the alternative accommodation will then be forced on him by order of the court. In the present case the offered alternative accommodation was part of the premises which the tenant was already occupying, but *Parmee* v. *Mitchell*[20] has decided that, in suitable circumstances, part of the accommodation already occupied by the tenant may be regarded as being adequate alternative accommodation, and there is no logical reason why a tenant who remains in part of the premises originally occupied by him should be in any better position than a tenant who has been obliged to incur the expense and trouble of moving elsewhere, only to be turned out by the landlord at a later date. No distinction should be made between the multiple landlord, who can offer other houses as alternative accommodation, and the landlord who has only one house and so has no alternative accommodation to offer save part of that house.

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[14] [1954] 2 Q.B. 210; [1954] 2 All E.R. 611.

[15] [1947] K.B. 242.

[16] [1954] 2 Q.B. 210, 219.

[17] [1950] 1 K.B. 1.

[18] [1953] 2 Q.B. 211; [1953] 1 All E.R. 99.

There is another difficulty involved in the tenant's argument. If the parenthesis is held to protect the tenant where the alternative accommodation is merely part of his existing accommodation, though not where it is wholly different accommodation, it is not easy to say which rule will apply where the alternative accommodation is made up partly of some or all of the existing accommodation, and partly of other accommodation. This may well arise where a house is let off in a number of separate but not self-contained dwellings, and the rooms are "reshuffled." In such cases, the answer might have to depend on the relative proportions of the existing and the other accommodation included in the alternative accommodation. Alternatively, it might be said that the tenant is excluded from the parenthesis by the introduction of a single new room, or (to go to the other extreme) that the protection of the parenthesis is attracted to the whole if it includes any part of the existing accommodation. The landlord's contention avoids all these difficulties.

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[19] [1950] 1 K.B. 1, 8.

[20] [1950] 2 K.B. 199; [1950] 1 All E.R. 872.

The parenthesis applies to a person who is the landlord of all persons claiming under or by a tenancy subject to which he purchased the premises, being original lessees or their assigns. The disability of the parenthesis passes with the estate of the landlord (see *Lucas* v. *Lineham* [21]), and the right of the tenant should similarly pass with his estate.

[Evershed M.R. If the formula is "the landlord of a particular tenant by virtue of a particular relationship of tenancy," that would exclude the tenant who leaves the premises. It would also exclude a post-purchase assignee, but there seems no reason why he should be able to rely on this provision for he is a newcomer taking the premises with knowledge of the position. Such a formula might reconcile any difference between the words of Scott L.J. in *Fowle* v. *Bell* [22] and Denning L.J. in *Littlechild* v. *Holt*.[23]]

The landlord would accept that formula.

[Romer L.J. The expression "landlord of a tenancy" seems an unnatural use of language. Can you refer us to anywhere where it has been used?]

Only at (1947) 63 Law Quarterly Review, p. 24, which has no authority.

G. Avgherinos for the defendant tenant. The parenthesis in paragraph (*h*) should be considered against the general background of the Rent Restrictions Acts, which are designed to protect a tenant in the occupation of his home by restricting the landlord's right to possession. The ground on which the landlord seeks possession in the present case, that is, that he requires it for his own occupation, was considered in *Powell* v. *Cleland*.[24] It is significant that the restriction in the present form of an absolute bar to a landlord who has purchased after the material date was first introduced in 1924, that is, after both the other "hurdles" referred to on behalf of the landlord had been in existence for some time; the legislature evidently thought that further protection was necessary for the tenant. The case of a sitting tenant who leaves but afterwards returns has been said to give rise to difficulties in accepting the tenant's submission, but there is no anomaly here for, if the sitting tenant voluntarily gives up possession, when, and if, he returns he is, as in *Fowle* v. *Bell*,[25] in the position of a new tenant. The words "landlord by purchasing" are, admittedly, elliptical, but must be construed in relation to the natural antithesis between "landlord" and "tenant," which are the words used at the beginning of the schedule. In other words, the phrase means the landlord in relation to the tenant before the court in the circumstances which are then before the court. If the sitting tenant at the date of purchase afterwards surrenders his tenancy in consideration of a new grant he will continue to enjoy the protection of the parenthesis; he is still occupying the premises as his home. There is nothing in the provision which limits it to one tenancy. If there is continuity of occupation of the premises as a home it is irrelevant whether the occupation is by virtue of the contractual tenancy subsisting at the time of the purchase, a following statutory tenancy, or a separate and distinct new contractual tenancy.

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[21] [1950] 1 K.B. 548.

[22] [1947] K.B. 242, 246.

[23] [1950] 1 K.B. 1, 8.

[24] [1948] 1 K.B. 262; 63 T.L.R. 626.

[25] [1947] K.B. 242.

[EVERSHED M.R. Physical occupation at the relevant date is not a pre-condition to protection for a contractual tenant by the parenthesis. The tenant may have sub-demised but he may nevertheless be protected by this provision.]

That is probably correct, but the principle should be tested, it is submitted, by considering the normal case. The interpretation given by Scott L.J. in *Fowle* v. *Bell*[26] is to be preferred to the observations of Denning L.J. in *Littlechild* v. *Holt*.[27] In the latter case the court was not concerned with limiting the protection to the sitting tenant, but with extending it to a person other than the sitting tenant, who was holding under a title derived from the statute.

[ROMER L.J. The language used by Scott L.J.[28] is far too wide, for it covers a tenant where there has been an interval after the purchase during which the premises have been vacant.]

The successor under section 12 (1) (*g*) of the Act of 1920 steps into the position of the predecessor and takes over his rights, including any rights with regard to defeasance. The protection is limited to the sitting tenant at the time of purchase except as extended by that section. If Denning L.J. went beyond that, his remarks were obiter. From the tenant's point of view, the test is whether the purchase put the landlord into the position of the tenant's landlord; the exact relationship between him and his landlord may have changed since the transaction, but the test is whether they have stood throughout in the relationship of landlord and tenant (whether contractual, statutory or as successor under section 12 (1) (*g*)), and whether the purchase, and nothing but the purchase, put them into that relationship. *Cairns* v. *Piper*[29] is distinguishable. The example where the landlord of business premises grants a new tenancy permitting the tenant to use the premises as a residence is fallacious, for the provision only applies where the premises purchased are a dwelling-house within the Acts. The anomaly which may exist between this case and the case where the landlord offers alternative accommodation not within the dwelling-house to which the original tenancy related has been prayed in aid by the landlord, but it is introduced by the words of the Act. If the court had a free hand that anomaly should be removed by extending the protection to the new accommodation, not by depriving the tenant of protection if he accepts alternative accommodation within the four walls of the house he is actually occupying.

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[26] [1947] K.B. 242, 246.

[27] [1950] 1 K.B. 1, 8.

[28] [1947] K.B. 242, 246.

It is not submitted that a post-purchase assignee of the sitting tenant is, or should be, protected by the parenthesis; for he came into the house after the purchase and took the assignment with his eyes open.

[ROMER L.J. The landlord does not become the landlord of the assignee by purchasing the dwelling-house but by the subsequent assignment.]

Alternatively, as the county court judge said, in referring to Denning L.J.'s statement in *Littlechild* v. *Holt*,[30] if the tenant entered into a new contractual tenancy not voluntarily, but, for example, under an order of the court or because of the threat of proceedings, he would not lose the protection. Here he did not voluntarily accept the new tenancy.

R. E. Megarry replied.

EVERSHED M.R. The very difficult question in this case is whether the plaintiff is entitled to an order for possession against the defendant (the county court judge having intimated that he would exercise all the discretions which are relevant in the plaintiff's favour), having regard to the provisions in the parenthesis in paragraph (*h*) of the First Schedule to the Rent Act of 1933. The parenthesis, which is well known, is: "(not being a landlord "who has become landlord by purchasing the said dwelling-"house or any interest therein after . . .)" a particular date which may vary with the particular house.

Although, upon a first reading, those few words in the parenthesis would not appear abstruse or involved, they have, none

[29] [1954] 2 Q.B. 210.

[30] [1950] 1 K.B. 1, 8.

the less, given rise from time to time to questions which have been decided in this court. For example, it was held in *Epps* v. *Rothnie* [1] that the words in parenthesis did not apply where the tenant being sued had been granted his tenancy after the landlord had purchased the house, the house having been vacant at the time of the sale by the previous owner. It was also held in somewhat similar circumstances in *Fowle* v. *Bell* [2] that where at the date of the purchase the house was tenanted, but by a different tenant from the tenant who was the defendant in the suit, similarly the parenthesis did not apply so as to give an added measure of protection to the tenant. A third illustration of a rather more complicated kind is afforded by *Littlechild* v. *Holt*.[3] At the date of the suit, or at least at the date of the hearing, the person in the position of landlord was not the landlord who had acquired the premises; for the latter had died, and his position had been taken by his wife as his personal representative. Similarly, the tenant who had been in occupation at the date of the purchase had also died, but his position had been taken by a relative in pursuance of the special privileges conferred upon a certain class of relatives by section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In the peculiar circumstances of that case this court came to the conclusion that the protection which had belonged originally to the tenant at the time of the purchase persisted in the person of that tenant's relative and availed against the former landlord's widow. The most recent case cited to the court was *Cairns* v. *Piper*,[4] in which the problem posed was, how the person being sued as tenant at the date of the writ would stand as regards this parenthesis if he had been a subtenant at the date of the purchase. The Court of Appeal said that he did not get the protection of the parenthesis.

It is not uncommon in regard to questions arising under the Rent Restrictions Acts to find that that which appears at first sight plain enough, when applied to particular facts gives rise to problems which are far from easy.

The facts in this case are different from any of those in the cases which I have mentioned. [His Lordship stated the facts and continued:] The effect of the plaintiff's purchase of the reversion was a legal position which, to the uninitiated eye, might seem a curious one, namely, that the plaintiff, being in occupation of the first and second floors, was still a subtenant of the defendant, but he had acquired the reversion immediately expectant on the defendant's lease; so that in respect of that interest the defendant paid rent to the plaintiff, but received rent from the plaintiff in respect of the first and second floors.

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[1] [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146.

[2] [1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668.

[3] [1950] K.B. 1; 65 T.L.R. 270; [1949] 1 All E.R. 933.

[4] [1954] 2 Q.B. 210; [1954] 2 All E.R. 611.

When, in 1952, the plaintiff sought to determine the defendant's tenancy of the whole house, he was, without doubt, vis-à-vis the defendant, subject to the disability of paragraph (*h*), and he offered alternative accommodation to the defendant. On a first reading of this legislation it may be that no one would think that a landlord could offer as alternative accommodation the same accommodation which the tenant was then occupying; but that that can be done is now accepted. The plaintiff did that in this case: he offered to the defendant the two floors which he then in fact occupied, and the defendant accepted that offer. By agreement between the parties there was therefore an agreement on the defendant's part to surrender the original tenancy of the whole house. That was followed by a new contractual tenancy from the plaintiff to the defendant limited to the ground floor and basement. The plaintiff's original subtenancy determined, of course, with the surrender of the head tenancy.

The landlord is now in truth asking for only one room, but he says: "I am now no longer in this matter subject to the special "prohibition of the parenthesis, because our relationship," putting it briefly, "is something quite new which has come into "being by the voluntary act or acts of the parties since I, the "landlord, purchased this house. Therefore it is no more true "to say of me that I have become your landlord by purchasing "the dwelling-house than it would be if you, the defendant, had "gone away altogether and I had granted a new tenacy to an "entirely different person who had never been there before." That is the problem, and it is plain that it is really in a very small compass, although, having regard to the decisions, it is not easy to keep it in its right perspective. I am bound, indeed, to make some references to those earlier cases.

I preface my references to those cases with this observation, an observation which in other contexts has been made before. After a matter has come before the courts on the meaning of a phrase in an Act of Parliament there is a certain danger that the courts thereafter will be construing not the Act of Parliament and the words in it, but expositions of the Act of Parliament which find their place in judgments of the court: and that is

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apt to be a dangerous process, because the expositions were made with reference to, and in a sense so as to be necessarily limited to, the particular facts of the particular cases in which they were pronounced.

The argument in *Fowle* v. *Bell*,[5] having regard to the facts, was whether the phrase "(not being a landlord who has become "landlord . . .)" meant merely "become landlord of the "premises." If it meant that, any tenant could pray in aid the restriction of the parenthesis against a landlord who, in fact, had become landlord of the premises since the relevant date, even though the tenant came into possession much later than the purchase. That was the view which was put forward by the tenant, but it was rejected by this court. In the course of his judgment Scott L.J. used this language, and having regard to the later citations of this passage it is obviously most important [6]: "In considering the bracketed exception to paragraph (*h*), we "must bear in mind that it is found in an enabling provision "which confers jurisdiction on the judge to order possession to "be given to the landlord; and, therefore, if there be ambiguity "in the exception, it ought to be construed in favour of the land-"lord and not against him. The phraseology seems to me neces-"sarily to mean this, 'not being a landlord who in relation to the "'tenant before the court has become that tenant's landlord by "'purchasing the dwelling-house or any interest therein after' "the given date 'for occupation as a residence.' The exception "so read would still achieve what I cannot help thinking was the "object of the exception within the brackets, namely, to prevent "an outsider first buying a house occupied by a tenant, then "giving the tenant notice to quit, and finally coming to the court "for an order to get rid of the tenant."

Scott L.J. also made reference to the language of MacKinnon L.J. in *Epps* v. *Rothnie* [7] to this effect, that if the contrary view prevailed, that is, if "the landlord" meant "the landlord "of premises," it was a mere waste of words to put in the long formula "(not being a landlord who has become land-"lord . . .)."

The statement which I have read sufficed to decide *Fowle* v. *Bell*.[8] But it need hardly be said that such a case as we have here was not in the mind of Scott L.J.; and when he said [9]: "The phraseology seems to me necessarily to mean this . . ."

[5] [1947] K.B. 242.
[6] Ibid. 246.
[7] [1945] K.B. 562, 566.
[8] [1947] K.B. 242.
[9] Ibid. 246.

I do not think that he was intending to give an exhaustive exposition of the exact scope and significance of this phrase for all purposes. If he was, it will be seen at once that a problem of some difficulty arises. What about the case of the tenant who is what is called the sitting tenant at the date of the purchase, but who subsequently goes away, returning years later and then claims under a new contractual tenancy? The question would then be whether he would have attached to him the privilege of paragraph (*h*); and if so, it would, I think, be a very strange result, and would appear to have no sort of relation to what I assume, agreeing with Scott L.J., has been the plain intention of the Act. But the exegesis of Scott L.J.[9] does not decide that point: "The "phraseology seems to me necessarily to mean this, 'not being a "'landlord who in relation to the tenant before the court has "'become that tenant's landlord by purchasing the dwelling-"'house . . .'" It is impossible, I think, to read that phrase as conferring this exemption on a particular individual, however long might be his absence from the premises.

A point which impressed me very much in Mr. Megarry's favour was that I thought at first that the argument for the tenant against Mr. Megarry would have to concede the peculiar anomaly that if it was said that "the landlord" must mean either the landlord of the premises or the landlord of a particular tenant, and the latter meaning was chosen, the particular individual would be given a special and quite irrational privilege. Mr. Avgherinos did not accept that he was in that difficult position. Indeed, it was so clearly an irrational result that Mr. Megarry himself suggested that the word "landlord" should not in any case be defined as meaning "the landlord of a particular tenant" (that is, the tenant before the court), but as meaning the landlord of the tenant by virtue of a particular contractual or other relationship; the landlord (that is to say) who became landlord of the tenant before the court *holding under his present title*. That suggestion undoubtedly involves inserting words into the statute. Sometimes it may be that the words inserted are in truth inherent in the words actually used, in this case the word "landlord"; but on the whole I have come to the conclusion that the insertion suggested by Mr. Megarry is not justified. I cannot find that we ought to put so elaborate a character upon this simple phrase, even for the purpose of avoiding the anomalous consequence which follows from interpreting the word "landlord" as meaning "landlord of the tenant."

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[9] [1947] K.B. 242, 246.

As I read the judgments in *Littlechild* v. *Holt*[10] (and I am fortified in that view by the circumstance that my brother Birkett, one of the judges then sitting, has his own recollection of the matter), the most important question was, did the widow of Mr. Littlechild stand in any better position than her deceased husband, she having acquired the premises not by purchase, but because she was the widow, the administratrix, and the beneficiary of her late husband? The Court of Appeal answered that question negatively by saying that she could be in no better position than Mr. Littlechild; putting it conversely, that Mr. Littlechild could not confer upon his widow any greater right or title than he himself possessed. The judgments of Lord Goddard C.J., who presided over the court, and of Birkett L.J. are, indeed, confined to that matter. But there was a second point. Mrs. Holt, the defendant, had succeeded to the occupation of the house because she was the daughter of her late father, Mr. Mills and, therefore, the court also had to decide how she stood in relation to this matter. Naturally enough *Fowle* v. *Bell*[11] and the language of Scott L.J. were cited. It was said that Mrs. Holt was outside the formula of Scott L.J. If that formula is read "not being a landlord who in relation to the tenant before "the court has become that tenant's landlord . . ." it had no application in Mrs. Holt's case, for when Mr. Littlechild purchased, Mrs. Holt was not the tenant at all.

My view of *Littlechild* v. *Holt*[12] is that that second question was resolved in Mrs. Holt's favour in this fashion. It was said, that looking at the operative part of the Act of 1933 [section 3] and the opening paragraph of the First Schedule, it is provided that the court shall not make an order for ejecting a tenant unless certain things happen; and it was said that the particular right which section 12 (1) (*g*) confers upon certain relatives is done by an oblique method. Section 12 (1) (*g*) merely provides something by way of a definition: " . . . the expressions 'tenant' "and 'tenancy' include subtenant and subtenancy, and the "expression 'let' includes sublet; and the expression 'tenant' "includes the widow of a tenant dying intestate who was "residing with him at the time of his death, or, where a tenant "dying intestate leaves no widow or is a woman, such member

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[10] [1950] 1 K.B. 1.

[11] [1947] K.B. 242, 246.

[12] [1950] 1 K.B. 1.

"of the tenant's family so residing as aforesaid as may be "decided in default of agreement by the county court;"

The result of that somewhat unusual method of enactment is not to confer affirmatively by statute a particular right upon a named relative, but by definition to extend the meaning of the word "tenant" to persons other than the one individual; in other words, for the purpose of *Littlechild* v. *Holt*[12] the court proceeded, as I think, on the view that Mr. Mills and his daughter Mrs. Holt were indivisible and indistinguishable for all relevant purposes. Both were comprehended in the words "the "tenant" for those purposes. Denning L.J., however, went somewhat further than that; indeed, he went a good deal further, and alone of the members of the court dealt generally with the situation of a tenant claiming the protection of this parenthesis: "In order," he said,[13] "that a landlord should be under the dis- "ability, three requisites are necessary:" I leave out the first, because nothing turns upon that in the present case. The Lord Justice went on: "Secondly, there must have been a contractual "or statutory tenancy in existence at the time of the purchase "which is still in existence today. But there need not be the "same tenant there. It is the tenancy which is protected, "whether it is a contractual tenancy which, since the purchase, "has become a statutory tenancy, or whether it has been a "statutory tenancy all the time. The protection is not lost by "a contractual tenant assigning his interest to another, or by a "member of the tenant's family succeeding to a statutory "tenancy. But it is lost when the tenancy expires and a new "one is voluntarily created."

Mr. Megarry has, naturally enough, fastened upon that passage in my brother's judgment and said that if that is to be treated as an exhaustive exposition of the relevant provisions of the Act, then he must win this case, because beyond a peradventure the "tenancy" which existed and which related the plaintiff to the defendant when the premises were purchased has since expired, and has given place to a new tenancy which was voluntarily created. But with all respect to Denning L.J., I do not think that he was intending to propound an exhaustive exposition of this parenthesis, and it was quite unnecessary for him to do so. It is equally clear that he had not in mind a case like the present, for the cases which he cited in support of his last and vital sentence were *Epps* v. *Rothnie*[14] and *Fowle* v. *Bell*.[15] Therefore, just as the statement of Scott L.J. is clearly not to be regarded as more than an exposition of the Act for the purposes of *Fowle* v. *Bell*,[15] so I take the exposition of Denning L.J. as being no more than one equally appropriate when considering *Littlechild* v. *Holt*.[16] If it went further I should not, as at present advised, agree with it. I do not find it easy to accept the notion that when Parliament speaks of a landlord, it means a landlord not of premises, not of a tenant, but of a "tenancy." It seems (if I may say so with all respect to those who have in other places used the phrase) an unnatural use of language. If the language of Denning L.J., taken in its literal sense, is right, it seems to me that very curious results would be produced. For, according to the phrase used by Denning L.J., if the tenant who was in possession under a contractual tenancy at the time when the landlord purchased later assigned for value to a third party, that third party would get the protection of this paragraph. That seems to me to be no less irrational and contrary to the real intention of the statute than the result in the other imagined case put forward by Mr. Megarry.

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[12] [1950] 1 K.B. 1.

[13] Ibid. 7.

Having referred, therefore, to those two passages, the one of Scott L.J. and the other of Denning L.J., and finding that neither is sufficient in terms to decide this case, or ought to be regarded by this court as binding us to decide it in a particular way, I now return to the facts of the present case and to the language of the Act as it stands. The question is whether, having regard to the facts, the plaintiff is a landlord who has become landlord (and that must mean here the tenant's landlord) by purchasing the dwelling-house. According to the common sense of the matter, I think the answer is that he is such a landlord; as a result of his purchase he became, in truth, vis-à-vis the ground floor and the basement, the landlord of the defendant, and so he has remained without a break ever since. It is true that the precise character and incidents of the relationship have varied. There was a period when the defendant was a statutory tenant and when his tenancy comprehended other rooms, although he was not in personal enjoyment of those other rooms; and now a new tenancy has been created; but as regards the dwelling-house of which those two floors consist, the plaintiff in this action became, as a result of the purchase, the defendant's landlord of that dwelling-house, and so he has remained consistently ever since.

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[14] [1945] K.B. 562.
[15] [1947] K.B. 242.
[16] [1950] 1 K.B. 1.

I am helped towards that conclusion by reading paragraph (*h*) in conjunction with the opening words of the schedule which refer to the ejectment of a tenant. I begin by noting the words "the "dwelling-house is reasonably required by the landlord"; and I ask myself who that is. Obviously it is the tenant's landlord: the landlord of the tenant against whom the landlord has proceeded. Then comes the parenthesis "(not being a landlord who "has become . . .)," which I interpret as meaning "not being "one who has become such by purchasing." I notice the words "has become," not "became"; and applying the standards of common sense to the facts in the case, I think that the plaintiff cannot avoid the result that he is the person who "has become" the defendant's landlord by purchasing; for that is how it is that he both became, and also has remained, his landlord, although he has since by negotiation altered somewhat the precise incidents of the relationship between them.

Confining myself, therefore, to the limited circumstances of this case, I conclude that the answer to this case is that which the county court judge gave. I realize (and I mention it because Mr. Megarry very naturally and properly emphasized it) that the decision creates something of an anomaly between the case where on the one hand, a landlord, who is admittedly restricted by the parenthesis, brings proceedings for possession and provides alternative accommodation elsewhere, and, on the other hand, the case where the alternative accommodation offered by the landlord consists of the precise accommodation which the tenant was in fact enjoying at the time of the proceedings. I have said that the idea that the latter is, or was, regarded by Parliament as being alternative accommodation seems to me to be one of the most surprising results of the legislation; but I think that that somewhat remarkable result being now accepted, the anomaly has in consequence been created. I am not, however, dismayed by it because, so far as I can see, whatever attempts are made to answer this problem, it is impossible to avoid some peculiar results.

Nor, secondly, do I forget the passage in the judgment of Scott L.J. to the effect that where there is ambiguity the court should tend to favour the landlord, since this was a provision for a landlord's benefit. But the first thing is to try to see what the words mean when applied to the facts of the case, and having reached my conclusion upon that process, I find no room for another view which would favour the landlord, particularly since, as I think, the alternative would inevitably involve making considerable interpolations into the words which Parliament has used of words of explanation or definition.

I desire, lastly, to make quite clear that I have not forgotten the importance of the point that the tenant in any case has the protection of the county court judge's discretion on the matter of reasonableness. That is an impressive point, and I feel that in this particular case the result is rather hard for the landlord. A more reasonable sharing of this house, according to the judge, would have resulted from a yielding on the defendant's part of one room to the plaintiff. Having regard to the changes in the families of both the parties, it may be that a certain amount of good neighbourliness and consideration can now be brought to bear so as to overcome the present difficulty. That, however, is another matter.

It seems to me that if a person was in occupation of a dwelling-house when the reversion on his tenancy was acquired by another, and if he has never ceased to occupy that dwelling-house as the tenant of that other, then it would offend against the sense and intention of the schedule and of the plain words used, to say that because the precise relationship which governs the relationship of landlord and tenant has undergone a change, and a change made by agreement, therefore the tenant can no longer allege against the landlord that he is a landlord who has become landlord by purchasing the dwelling-house.

I have done little more than follow and expand the reasoning of the county court judge. He said, after reading the passage from the judgment of Denning L.J.: "If the words of the second "requisite are accepted literally, the landlord here must succeed. "But in *Littlechild* v. *Holt* [17] the tenant seeking protection was "a person who had succeeded to the tenancy under s. 12 (1) (*g*) "of the 1920 Act, and the reference to *Epps* v. *Rothnie* [18] and "*Fowle* v. *Bell* [19] seems to me to indicate that Denning L.J. "did not have in mind the sort of circumstances that have arisen "here. Further, Denning L.J. says 'voluntarily created,' and, "as I have already indicated, I do not think the agreement of "September 30 was in a true sense voluntary. It would be "strange if the tenant could put himself in a better position by "incurring the costs of unnecessary litigation and submitting to

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[17] [1950] 1 K.B. 1.

[18] [1945] K.B. 562.

[19] [1947] K.B. 242.

"an order of the court." The last two sentences are a reference to the settlement made in 1952, and I need not take further time upon that. The county court judge continued: "My conclusion "is that it is the policy of the Act to protect a tenant in the "position of the defendant; that the words of the disabling phrase "are clearly capable of being construed to protect him, and that "they ought to be construed accordingly." My conclusion is the same and I would dismiss the appeal.

BIRKETT L.J. I am of the same opinion. It is agreed that in this appeal the only question with which we are concerned is whether, on the special facts, the plaintiff is a landlord who has become landlord by purchasing the dwelling after September 1, 1939, so as to place him under the disability contained in paragraph (*h*) of the First Schedule to the Act of 1933. I agree with the Master of the Rolls that the county court judge, while considering, of course, other topics with which we are not concerned, referred to this topic in the words which he has quoted, and in particular the words which I would desire to emphasize: "My conclusion is that it is the policy of the Acts "to protect a tenant in the position of the defendant; that the "words of the disabling phrase are clearly capable of being "construed to protect him, and that they ought to be construed "accordingly."

In my experience, in any case arising under the Rent Restrictions Acts it would be idle to say that the point is ever simple or easy; on the contrary, some of the most complicated and thorny problems arise under the provisions of these Acts, and one must do the best one can.

[His Lordship, having stated the facts, continued:] It appears to have been conceded that so far as the defendant's contractual tenancy in the first instance was concerned, the disability that attached to paragraph (*h*) of the schedule to the Act of 1933 was binding upon the plaintiff. Similarly, the same disability attached to the statutory tenancy which arose in consequence of the notice to quit served in 1952, but it is said that because of the agreement which the tenant made on September 30, 1952, whereby he surrendered the tenancy which was subsisting in July, 1952, and entered into this new tenancy for different rooms in the same house, that was a new tenancy, and the old disability under the schedule thereby departed.

Mr. Megarry's sole point was that whilst the disability clearly attached before the moment that the original tenancy was surrendered and the new agreement entered into, at that moment the disability was terminated and the landlord was no longer restricted by it. He relied strongly on *Littlechild* v. *Holt*.[20] As a member of the court which heard that case, it is idle to say five years afterwards that I remember all of it in great detail, but I do remember it very well. It is clear that there were two points in that case, one being a major and the other a minor point. The minor point was about the position of Mrs. Holt. Was she a tenant, and was she protected, or was she not? I think that counsel who appeared for the defendant said that Mrs. Holt, by reason of section 12 (1) (*g*) of the Act of 1920, as amended, stood in the shoes of her father as the sitting tenant and was similarly protected; that is to say, she could not be ejected because of the disabling provision in the Act of 1933; and counsel, Mr. Wallis-Jones, in reply, said that Mr. Littlechild was within the exception of paragraph (*h*) as against Mr. Mills (the original tenant), but not as regards Mrs. Holt, so that Mrs. Holt's tenancy was a separate tenancy. In dealing with that Lord Goddard C.J., who delivered the leading judgment, said[21]: " The first question that " arises is whether or not Mrs. Holt was in the position of a " protected person holding over after her father's death, that is, " whether she was a ' tenant ' within the meaning of section 12 " (1) (*g*) of the Increase of Rent and Mortgage Interest (Restric-" tions) Act, 1920. By that provision the expression ' tenant ' " includes, where a tenant leaves no widow or is a woman, such " member of the tenant's family who was residing with him at " the time of his death and (by section 13 of the Act of 1933) " for not less than six months before the death, as may be " decided, in default of agreement, by the county court. The " Acts of 1920 and 1933 must be read together and we must take " it that the judge has found that Mrs. Holt was such a tenant."

If I may pass over the judgment of Denning L.J. for the moment, what I said upon that topic was[22]: " My Lord, in his " judgment, stated clearly the position of Mrs. Holt, and came " to the conclusion, both on the construction of the Acts of " Parliament and on the findings of the county court judge, that " she was in a position to be protected; she was a protected " tenant."

Denning L.J., who first of all in his judgment considered the major question, referred to the matter of Mrs. Holt's position in these words[23]: "There was then a statutory tenancy in "existence in the hands of Mr. Mills. That tenancy is still in "existence today in the hands of his daughter Mrs. Holt, who, "as a member of his family, succeeded to the tenancy. Mr. "Littlechild was therefore subject to the disability, and his "wife, as his successor, is in no better position than he. There-"fore the disability applies, and the landlord cannot recover "possession without giving alternative accommodation."

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[20] [1950] 1 K.B. 1.
[21] Ibid. 4.
[22] Ibid. 8.

The county court judge in that case had taken this course; he had taken these words in paragraph (*h*) literally and had said that whatever might have been said about Mr. Littlechild, who undoubtedly purchased the premises, Mrs. Littlechild never had purchased them and, therefore, she was not, and could not be, a landlord who "has become" landlord by purchase. The Court of Appeal unanimously reversed that decision, dealing, as I have said, with the major problem.

The only difficulty about that case arises from the words in the judgment of Denning L.J. upon which, quite naturally, Mr. Megarry has placed great reliance. It is difficult, of course, for anyone to say what exactly was in the mind of a judge dealing with particular facts in a particular case when he gave utterance to certain words, but I speak with some confidence when I say that I am sure that Denning L.J. did not have in mind at that time the kind of situation with which we have been confronted in the present appeal. Indeed, if the words upon which Mr. Megarry relied are looked at for a moment, I think that that is plain[24]: "Secondly, there must have been a contractual "or statutory tenancy in existence at the time of the purchase "which is still in existence today. But there need not be the "same tenant there." That was in truth meant to apply to Mrs. Holt. The court was considering a case where it had been contended that Mrs. Holt was a separate person altogether, and that her right of possession must be regarded as a separate tenancy, whereas it was being said against that that she stood in the shoes of her father under section 12 (1) (*g*) of the Act of 1920.

Denning L.J. proceeded[24]: "It is the tenancy which is "protected, whether it is a contractual tenancy which, since the "purchase, has become a statutory tenancy, or whether it has "been a statutory tenancy all the time." Denning L.J. continued with this rather controversial sentence: "The protection

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[23] [1950] 1 K.B. 1, 8.

[24] Ibid.

"is not lost by a contractual tenant assigning his interest to "another, or by a member of the tenant's family succeeding to "a statutory tenancy. But it is lost when the tenancy expires "and a new one is voluntarily created." In support of that statement Denning L.J. then referred to *Epps* v. *Rothnie*,[25] where it was held that the disability does not apply to a person who buys with vacant possession and subsequently lets the house, and to *Fowle* v. *Bell*,[26] which was the case of a landlord who, when the house became vacant, relet to a new tenant. I cannot think that the special facts of this case were present to Denning L.J.'s mind when he made those observations.

As Mr. Megarry said, it must be faced clearly that there was here a surrender of the existing tenancy, and that there was the creation of a new tenancy in the terms of the letter of September 30, 1952; but I am by no means satisfied on the facts that, therefore, the disabling provision of paragraph (*h*) is removed, and I think that I would like to adopt exactly what the Master of the Rolls said with regard to that matter. If on the facts of this case anyone were to ask this tenant how the plaintiff became his landlord, he would obviously say that the plaintiff became the landlord because he bought the premises. The tenant would say: "It is true there has been an adjustment with regard to "the room which has been the matter of agreement, and it is "true that I surrendered the tenancy which existed between us "with regard to certain rooms and took on those other rooms all "in the same house, all in the same building, all in the building "which had been purchased by the landlord." I think that if the question is asked, did this landlord become landlord by purchase, the answer is "yes." I think the words "has become," if I may say so, refer to a thing past. The words "who has "become the landlord" relate to the present. He may have purchased two years ago, but he is the landlord today in consequence of the purchase, and as a result he has become the landlord by purchase.

I see the strength of Mr. Megarry's point that, strictly, the plaintiff was the landlord by purchase in the first instance in relation to the contractual tenancy, that he was certainly the landlord by purchase in the case of the statutory tenancy which came into existence subsequently, but that the moment that statutory tenancy ended and the new contractual tenancy was brought into being between the parties, there was a new state of

[25] [1945] K.B. 562.

[26] [1947] K.B. 242.

affairs altogether and it was as though a new tenancy had come in, and that, therefore, the disabling provision of paragraph (*h*) no longer applies; but I still take the view that the county court judge was right when he determined this case in the way he did. The county court judge, after examining all the facts in the case, and bearing in mind what Denning L.J. had said, but expressing the view which I think has much to support it, that Denning L.J. did not have in mind the set of circumstances which has arisen here, decided that it was the policy of the Acts, as, indeed, it is, to protect a tenant in the position of the defendant, that the words of the disabling phrase were clearly capable of being construed to protect him, and that they ought to be so construed.

It clearly was the intention of the Act of Parliament when it was first introduced and as it was later developed that in certain circumstances the landlord might obtain possession if he could show that the premises were reasonably required by him, but that the situation in which a man might say: "I am the "landlord, and I want the premises for my own possession, but "I have only recently bought the premises and put myself in "the position so that I can turn that tenant out" should be absolutely barred. It was an additional protection to tenants, and I think, on the special facts in this case, it was a protection which ought to be given to the defendant. I would answer the question whether the plaintiff is a landlord who has become a landlord by purchase since 1939 by saying that he is, and I would dismiss the appeal.

ROMER L.J. I agree, and have only a word or two to add. I am quite satisfied, after the elaborate and able argument which has been addressed to us, that the word "landlord" which appears in parenthesis in paragraph (*h*) of the First Schedule of the Act of 1933 is related to "tenant" and not to "tenancy." I think that the conception of "landlord of a "tenancy" is an extremely unusual one, and I, personally, have never met with it in practice. That being so, one would assume that it was being intended to be used in its ordinary relationship, and that it should be read as meaning either "land-"lord of premises" or "landlord of the tenant." "Landlord of "premises" is not the construction which it has received from the courts, and that leaves, therefore, only "landlord of the tenant"; and that that is what is meant is plain, I think, from the words which introduce the First Schedule to the Act of 1933 and which refer to the ejectment of a tenant. So I conclude that "not being a landlord who has become landlord . . ." means who has become "landlord of the tenant." That is the view of the matter which was taken by Scott L.J. in *Fowle* v. *Bell*[27] in the passage to which the Master of the Rolls has referred, and also by Bucknill L.J., who said in the course of his judgment in that case[28]: "I think there are two possible interpretations of "these words: one is 'not being a landlord who has become "'landlord of the dwelling-house'; and the other 'not being a "'landlord who has become landlord of the present tenant by "'purchasing the dwelling-house.'"

Somervell L.J. in the same case placed this construction on the phrase, saying that it was restricted to cases in which the tenant sought to be evicted was a sitting tenant at the time of the purchase. Those ways of looking at the matter are fatal to Mr. Megarry's client, and he sought to add something to what Bucknill L.J. said in his definition (and I may say that Singleton L.J. in *Cairns* v. *Piper*[29] approved and adopted what Bucknill L.J. had said). Mr. Megarry invites us to say that it means "who has become landlord of the present tenant" (following so far what Bucknill L.J. said) and then adding "holding under "his present title"; and he sought to introduce that addition to the definition given by Bucknill L.J. in order, as he said, to avoid certain anomalies which he pointed out might arise out of the alternative accommodation provision.

For my part, I do not think that there is any sufficient justification for adding those words to the definition which Bucknill, Scott and Singleton L.JJ. and others have placed upon these words, and I am not prepared to do so. I think that the definition which has been given and which, if applied to this case, affords protection to this present tenant should be adopted, and the appeal, consequently, fails.

Appeal dismissed.

Solicitors: *Harold Tuffee & Son, Gravesend, Kent; Hatten, Winnett & Holland, Gravesend, Kent.*

E. D.

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[27] [1947] K.B. 242, 246.

[28] Ibid. 248.

[29] [1954] 2 Q.B. 210, 219.

C. C. A.

REGINA *v.* ONUFREJCZYK.

1955
Jan. 11.

Lord Goddard C.J., Cassels and Sellers JJ.

Criminal Law—Murder—Evidence—Corpus delicti—Proof of corpus delicti by circumstantial evidence—Disappearance of alleged victim —No trace of body—No direct proof of death or of killing—No admission as to death of alleged victim by accused person—Whether corpus delicti sufficiently proved by circumstantial evidence— Whether evidence supported conviction of murder.

In a trial for murder the fact of death can be proved by circumstantial evidence provided that the jury are warned that the evidence must lead to one conclusion only, and, therefore, notwithstanding that there is no body, or trace of a body, or any direct evidence as to the manner of death of a victim, the corpus delicti may be proved by such circumstances as render the commission of the crime certain and leave the jury with no degree of doubt.

Where, therefore, the appellant was convicted of the murder of his partner, who had disappeared, and there was no trace of the victim's body, or direct evidence of his death, or of the way in which he had died, and no confession or admission of the death by the appellant, but very strong evidence, in particular the conduct of the appellant, which showed that he knew that the victim could never appear again but had tried to fabricate evidence that he was alive, that, if the victim was dead, the appellant had murdered him:—

Held, that there was evidence from which the jury, after a proper warning that they must first apply their minds to the question whether or not a murder had been committed, might infer that the victim was dead, and, if he was dead, that his death was not a natural one, and that, a corpus delicti having been thus established, the evidence was such that the jury were entitled to find the appellant guilty of murder.

Statement of the law in the headnote to *Rex* v. *Horry* [1952] N.Z.L.R. 111 approved.

APPEAL against conviction.

The appellant, a Pole, was charged at Swansea Assizes in November, 1954, with the murder of his partner, another Pole named Sykut, who had disappeared. Sykut was last seen on December 14, 1953, and the case for the prosecution was that the appellant had murdered him on the evening of that day or later, probably in the kitchen of the farm where they both lived. There was no trace at all of the body of Sykut or any direct evidence of his death or proof of how he died, but there was very strong evidence, in particular the appellant's course of conduct, that, if Sykut was dead he had been murdered by the appellant. There was also evidence of motive, for a notice given by Sykut to the appellant terminating their partnership in the farm had expired, and the appellant, although he appeared anxious to obtain control of the farm, seemed to lack the means to purchase Sykut's half share. The appellant made no confession or admission as to the death of Sykut; he said that he had last seen him on the evening of December 18, 1953, when three other Poles had forced him to enter a car and had driven him away from the farm, and that he was alive and well then.

The jury found the appellant guilty of murder. He appealed on the grounds, inter alia, that the judge had failed adequately to warn the jury of the danger of convicting the appellant of murder in the absence of any direct proof of the death or of the killing of the alleged victim, and, in particular, had failed to inform them that there was no known case in the United Kingdom or the Commonwealth in which, without any evidence of identification of a body, or traces of a body, or violence used to a body, or of anything approximating to a confession or an admission by the prisoner that the alleged victim was dead, the factum of murder had been held to be sufficiently proved by circumstantial evidence; that the judge's direction on the law was in substance confined to reading to the jury the headnote to *Rex* v. *Horry*,[1] where there had been evidence of statements by the prisoner that the victim had in fact died, and the judge had failed to draw the jury's attention to that distinction; and that having regard to the evidence, in that (a) there was no or no sufficient evidence of the death of Sykut, (b) the contention of the Crown that certain bloodspots and a fragment of bone established that the appellant used violence to Sykut which caused his death was not substantiated, (c) there was no admission by the appellant that Sykut was dead, and (d) there was no proof either of the death of Sykut or of his killing by the appellant, the verdict of the jury could not be supported.

Elwyn Jones Q.C. and *Jenkin Jones* for the appellant. The conviction cannot be supported on the evidence, which was wholly circumstantial. Admittedly there were a number of suspicious circumstances pointing to falsehoods and lack of frankness on the part of the appellant, but there was no evidence of a corpus delicti, and the inference that Sykut is in fact dead and that the appellant killed him is pure conjecture. If Sykut were to walk into this court now, not one word of the case for the Crown would be proved wrong. Circumstantial evidence alone may suffice to establish murder, but only in special circumstances, and a higher degree of proof is required than when there is other evidence. Sir Matthew Hale in Pleas of the Crown, vol. 2 [289], said: "In some cases presumptive evidences go far to prove a "person guilty, though there be no express proof of the fact to be "committed by him, but then it must be very warily pressed, for "it is better five guilty persons should escape unpunished, than "one innocent person should die"; and (ibid. [290]): "I would "never convict any person of murder or manslaughter, unless the "fact were proved to be done, or at least the body found dead." It is clear that those words are disjunctive, and that they do not support the proposition that in no case should there be a conviction for murder without the production of the body, but they do establish the need for either the production of the body or for some direct evidence, however slight, of the factum of murder. The *Warwickshire Case* [2] and the *Staffordshire Case*,[3] referred to by Sir Matthew Hale, and the earlier authorities date from a time when hanging was the penalty for stealing a sheep and respect for human life was less great than now. In Phipson's Law of Evidence, 9th ed., 1952, p. 2, a distinction is drawn between direct and circumstantial evidence; it is that distinction which judges have had in mind in continuing the tradition stated by Sir Matthew Hale. Montague Smith J. in *Regina* v. *Williams* [4] went further than it is sought to invite this court to go; in *Rex* v. *Hindmarsh* [5] there was some direct evidence of the killing from which the jury could infer that the victim was dead before he reached the water.

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[1] [1952] N.Z.L.R. 111.

[LORD GODDARD C.J. I do not think that the case before Gould J.[6] has ever been followed.]

It is prayed in aid to show the extremities to which judges have gone to avoid the hideous situation of a man being convicted of the murder of someone who might still be alive. See also Kenny's Outlines of Criminal Law, 16th ed. (Cecil Turner's), 1952, p. 378, and the direction of Jelf J. in *Rex* v. *Farquharson*.[7] In *Regina* v. *Armstrong* [8] there was evidence which put the case on a different footing. In all the cases there has always been some direct evidence of the killing or there has been a body. This is the first case in which there is evidence of neither.

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[2] Hale, 2 P.C. [289] 290; Coke's 3rd Institute, c. 104, p. 232.

[3] Hale, 2 P.C. [289] 290.

[4] (1871) 11 Cox C.C. 684.

[5] (1792) 2 Leach C.C. 569.

[6] Cited 2 Leach C.C. 571.

[7] June 29, 1908, Sussex Assizes (unreported). [Cited Kenny, Criminal Law, 16th ed., p. 378, n. 4.]

[8] The Times, Aug. 18, 1875.

[LORD GODDARD C.J. The question is whether there was evidence which could properly be left to the jury. Circumstances are very different nowadays from what they were in the time of Sir Matthew Hale.]

Modernity has made concealment and flight easier. There could have been a surreptitious departure from this island. If anything, the rule is more important at the present time. The fact that the appellant was apparently the last person to see Sykut and that he has given differing accounts is not sufficient. There must be proof of the death as well as proof of the killing, for the essence of a case of murder is that the factum of death must be established by more than mere conjecture. The lies told by the appellant might be due to guilt, but not necessarily to guilt of murder.

The direction of the judge to the jury was inadequate. There was a mere formal caution to the jury as to the burden of proof which the prosecution had undertaken, and the reading out of the headnote to *Rex* v. *Horry* [9] was in the circumstances inadequate. [Reference was made to Wills on Circumstantial Evidence, 7th ed., 1936, p. 338, and *Regina* v. *Tawell*.[10]] It is not submitted that *Rex* v. *Horry* [11] is not a correct statement of the law, but it is distinguishable because in that case on three occasions the accused person admitted or asserted that the victim was dead. In the present case the appellant made no such admissions and the judge should have pointed out to the jury that vital distinction between the two cases. He should have warned them that the Crown was asking them to do a highly dangerous thing and that there was now imported into the burden of proof required a duty to establish a moral certainty.

[LORD GODDARD C.J. What does moral certainty mean?]

It does seem to amount to more than a lack of reasonable doubt. The origin of the conception is to be found in *Rex* v. *Horry*.[12]

[LORD GODDARD C.J. It is mere words. A thing is either proved or not proved. Must you not show that there was no evidence fit to be left to the jury that Sykut was dead?]

Sykut might have died naturally. [Reference was also made to *Rex* v. *Nash*.[13]]

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[9] [1952] N.Z.L.R. 111.

[10] (1845) 2 C. & K. 309n. [Cited Wills on Circumstantial Evidence, 7th ed., p. 388.]

[11] [1952] N.Z.L.R. 111.

[12] Ibid.

[13] (1911) 6 Cr.App.R. 225.

[Lord Goddard C.J. If the jury were satisfied that Sykut had disappeared why could they not draw the inference that he was dead? If there is evidence which justifies a judge leaving a case to the jury and he directs them that they must be certain before they convict, this court, except in a case such as *Rex* v. *Wallace*,[14] cannot say that the jury must have had a doubt.]

In practice, except in *Rex* v. *Horry*,[15] juries have never been allowed to convict a person of murder on mere circumstantial evidence.

[Lord Goddard C.J. What virtue is there in the words "direct evidence"? It would be going a long way, especially in these days when we know what can be done with acid, to say that there cannot be a conviction without some proof of a body. If you are right you have to admit that a successful disposal of the body could prevent a conviction.]

Here there was no suggestion as to the disposal of the body. The jury should have been told that there is no case in which there has been a conviction for murder without some direct evidence of the fact of death or murder.

[Lord Goddard C.J. referred to *Regina* v. *Burton*.[16]]

There was no such caution given to the jury in this case as was referred to by Maule J. in *Regina* v. *Burton*.[16] The appellant could only be properly convicted if the presumption that Sykut was dead was irresistible; it is submitted that there was no such presumption.

[Lord Goddard C.J. Your submission must be that there was no case fit to be left to the jury.]

It seems that it must come down to that.

H. Edmund Davies Q.C., *W. L. Mars-Jones* and *Esyr Lewis* for the Crown. Not only was this a case fit to be left to the jury, but also the evidence was of so compelling a nature as to render proper the judge's description of the verdict as completely just. It is impossible to divide the evidence into halves—as to the death of Sykut and as to whether the appellant killed him. The evidence clearly established that Sykut was dead, who had a motive for killing him, and who, on his own showing, last saw him alive. The conduct of the appellant was conclusive, and can only be construed as showing two things: that he had a clear knowledge that Sykut was dead, and that he was determined to profit as speedily as possible from his death. Not only was December 14 the last day on which anyone in the locality had seen Sykut alive, but on that afternoon the appellant visited a solicitor who was handling the partnership affairs, and also made an appointment to meet a friend on December 16. There was some evidence of a physical assault between the two men, and evidence of a convincing character that on at least three occasions the appellant had uttered threats concerning the safety of Sykut. On November 14, the day when the six months' notice terminating their partnership expired, Sykut had said that he would get a High Court order settling the partnership, and there was evidence that the appellant had said that he would rot in prison and Sykut would rot under the hedges. Later, nearer December 14, the appellant said of Sykut to a third person: "He is afraid to go home; he thinks I might kill him." The appellant had clearly made desperate efforts to raise money to buy up Sykut's half share of the farm, and the conclusion which the prosecution invited the jury to draw was that on December 14 the appellant was determined not to lose his farm and lacked the financial means to prevent himself from being deprived of it.

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[14] (1931) 23 Cr.App.R. 32.

[15] [1952] N.Z.L.R. 111.

[16] (1854) Dears.C.C. 282; 6 Cox C.C. 293.

The letters written by the appellant were inconsistent with the story which he told at his trial, and the jury were entitled to take the view that he was lying and that his conduct was consistent only with knowledge that Sykut was dead. All the evidence leads to the irresistible inference that the appellant knew that Sykut was dead, and that he killed him.

LORD GODDARD C.J. The appellant, a Pole, who has been in this country since 1947, was convicted before Oliver J. at the last assizes for Swansea of the murder of his partner, another Pole, named Sykut. The trial lasted for some 12 days and was summed up with meticulous care by the judge, who analysed the evidence in what I think I might describe as a masterly fashion, and the principal question argued on this appeal is whether there was proof of what the law calls a corpus delicti. For the remarkable fact about this case—and it has remained remarkable and unexplained—is that the body of Sykut who was last seen, so far as anybody knows, on December 14, 1953, has completely disappeared, and there is no trace whatever either of him or his clothes or his ashes.

It has been submitted to us that unless the body can be found or an account given of the death, the law is that there is no proof of a corpus delicti. Corpus delicti means, first, that a crime has been committed, that is to say, that the man is dead, and that his death has been caused by a crime. As Sir

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William Scott, later Lord Stowell, pointed out a great many years ago in *Evans* v. *Evans*,[1] a matrimonial case, one does not begin to inquire whether the prisoner is guilty of a crime until one has established that a crime has been committed.

Now it is perfectly clear that there is apparently no reported case in English law where a man has been convicted of murder when there has been no trace of the body at all. But it is equally clear that the fact of death, like any other fact, can be proved by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion, provided that the jury are satisfied and are warned that it must lead to one conclusion only. Oliver J. began and ended his summing up to the jury with the direction which he took from *Rex* v. *Horry*[2] before the New Zealand Court of Appeal, saying that it was as clear a direction as he could give. The headnote of that case, which he took as stating the law, is as follows: "At the trial of a person "charged with murder, the fact of death is provable by circum- "stantial evidence, notwithstanding that neither the body nor "any trace of the body has been found and that the accused "has made no confession of any participation in the crime. "Before he can be convicted, the fact of death should be proved "by such circumstances as render the commission of the crime "morally certain and leave no ground for reasonable doubt: "the circumstantial evidence should be so cogent and compelling "as to convince a jury that upon no rational hypothesis other "than murder can the facts be accounted for."

Speaking for myself I entirely agree with that as a statement of the law except that I would not have used the words "morally certain"; I would prefer "such circumstances as "render the commission of the crime certain." It is always a pity, when dealing with evidence, to use epithets either to increase or decrease its value; and when cases in the books use expressions such as "a high degree of certainty" or "strong "evidence" and so on, they really add nothing to what the law requires. The law requires a case to be proved, and a jury is warned and told that its members have to be satisfied on the evidence that the crime is proved, that the prisoner is guilty of the crime; and they should be told that if when they have heard the evidence they are not satisfied, and do not feel sure that the crime has been committed or that the prisoner has committed the crime, their verdict should be "not guilty." Let us leave out

[1] (1790) 1 Hag.Con. 35, 105.

[2] [1952] N.Z.L.R. 111.

of account, if we can, any expression such as "giving the prisoner "the benefit of the doubt." It is not a question of giving him the benefit of the doubt, for if the jury are left with any degree of doubt that the prisoner is guilty, the case has not been proved.

Oliver J., having read that statement of the law contained in the headnote to *Rex* v. *Horry*,[2] said to the jury: "It is "indeed a grave step to find a murder proved when there is no "body; but it is not the law, and I do not believe it has ever "been the law—it is certainly not the law today—that if a body "can be got rid of so that no trace of it can be found, a "murderer who has done so is not to be convicted. That is not "the law. But, of course, the burden of proving everything "against the man is on the Crown. There is no burden on him "to disprove anything. I think the most helpful way I can "bring this to your minds is to say this. If Onufrejczyk had not "given evidence at all in this case, and all you had was the case "for the Crown, would you be satisfied with that case unanswered, "the case for the Crown? If you would, then you will proceed. "But if you were, for instance, to come to the conclusion that "the case for the Crown standing uncontradicted was not good "enough—suppose you took that view—then you need not go "on to consider Onufrejczyk's explanation; there is no burden "on him." A little later, before turning to the details of this remarkable case, the judge said: "If he did not die by natural "causes, he was killed. Members of the jury, if he was killed "his body was concealed or destroyed and has not been found. "If he is dead and was killed and the body was destroyed or "concealed, he was murdered, was he not? That is the point. "I want you to apply your minds to that set of circumstances, "and decide for yourselves whether, in the light of those facts, "and many more to which I shall have to draw your attention, "you can say that you are satisfied that no rational hypothesis "except that he is dead, dead by violence, is open. If you are "driven to that conclusion, that would be a verdict of murder; "but if you think that that would be going too far, and that "you could not safely say that no rational explanation of his "death except murder could be conceived, why then it will mean "that you have a doubt about it, and you will acquit him." I do not think that Mr. Elwyn Jones, for whose assistance and forceful and temperate argument in this case the court is much indebted, would quarrel with that direction of the judge, which seems to me as ample and as fair to the accused man as it is possible to conceive.

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[2] [1952] N.Z.L.R. 111.

Sir Matthew Hale, writing at the end of the 17th century, said, in his Pleas of the Crown, vol. 2 [290]: "I would never "convict any person of murder or manslaughter, unless the fact "were proved to be done, or at least the body found dead." He said that one must prove the fact of the murder, or at least that the body had been found. He did not say—although that passage is very often quoted as though he had so said—that a man cannot be convicted of murder unless the body of the victim is produced or accounted for. One has to remember (especially as there have been dicta of other judges from the earlier part to the middle of the last century which give some colour to the idea that the court will always require in the case of murder or manslaughter the production of the body) that the circumstances of these days are different from those of Sir Matthew Hale. When Sir Matthew Hale wrote, there was no police force; there was nothing but a watchman in a town, and a parish constable who might have been an old infirm man of 70 or 80 in the country. There was no police force at all. There was no telegraph; there were no motor-cars; there was no legislation in respect of aliens such as we now have. For instance, there was no way of ensuring that aliens were registered and did not get out of the country without permission once they were here, and so on. It would therefore be strong indeed were any court to lay down that a murderer could not be convicted without production of the body, or an accounting for it by somebody who had seen it or seen the murder committed, if all the evidence satisfies the jury that there has been a murder.

The case against the prisoner was this: He and Sykut had a farm. The farm was a failure, and the appellant had come to the end of his resources. He was in dire need of money; of that there cannot be any doubt, for his own letters show it. He was trying to borrow money from this person and that, that relation and near friend; and he failed every time. He had actually got to the point when he was obviously considering fraud, for he was hoping to find a valuer who would overvalue the farm so that he might be able to raise more money on mortgage from his bank. Meanwhile, Sykut wanted to break off his association with the appellant. There was a suggestion that he should be paid out. Sykut had invested his money in the farm and was willing to sell his share in it for £700 if he could get it from the appellant; otherwise, Sykut had said, the farm must be put up for sale. They had been to Mr. Roberts, a solicitor of Llandilo, and their difficulties had been discussed before him. There was evidence—though for myself I do not think that it was anything like so strong or convincing, as was much of the other evidence, as to point towards murder—that the men had quarrelled; but by December 14 nothing had happened for any conclusion to be reached between the two men about the sale of the farm. Whether or not the appellant had at that time any money beyond perhaps a few shillings or a few pounds it seems clear that he had nothing at all to enable him to buy out his partner. He, the appellant, was very anxious to avoid the sale by auction and wanted to get the whole farm, because presumably he thought that if he had the whole of it he could make a satisfactory business out of it.

On December 14 Sykut disappeared, not only from Carmarthenshire, not only from England but, so far as is known, from the face of the earth. Letters came from Poland from his wife after his complete disappearance when there would have been ample time for him to have got back to Poland and to have got into touch with his friends, which would seem to show that he had not gone back to Poland; and the last person who is known to have seen Sykut is the appellant.

The appellant's activities after December 14 were certainly very remarkable. There was evidence, and very strong evidence, that the appellant must have posted a letter to a Polish woman living not very far away not later than a quarter to five, or possibly five o'clock, on December 18. In that letter he said: "My case is already completed, but I must if only for a few "hours pop in to London to take from my acquaintances money. "I gave my partner the gross of the money"—I suppose that means the larger part of the money—"because I borrowed for a "few weeks, only I must sell what is possible. So beg you very "much to help me in this matter and I will be very grateful, at "the moment this is all for now, the rest we talk over when Mrs. "comes over. Beg you to inquire whether it is possible to sell "the poultry alive before the holidays, as I must have at least "part of the money to begin something and may be some of the "cattle. Hand kisses, expecting as soon as possible to see you "because my partner is leaving for 14 days and might change "his mind. Please don't wait a moment because it might be too "late." There he is saying that he has fixed up matters with his partner, that he has paid him most of the money and that he is expecting him to go away for a few days. What we know is that the appellant went to London and that he was trying by every means in his power to borrow money from relatives there to enable him to pay off his partner. He was getting a woman, who gave evidence and who evidently impressed the judge, to forge—there is no other word for it, though she may not have known that she was forging—documents purporting to be agreements, and then adding a signature to them which purported to be the signature of Sykut, and he was giving all sorts of contradictory accounts. When he was required to give an account of how his partner disappeared, he told the sort of story that might well be found in a magazine or a detective story, or a story by the late Phillips Oppenheim, as to how a large, dark car, sometimes described as black and sometimes as green, had arrived at this lonely farm at 7.30 at night, finding its way up a dreadful rocky path; that there were three men, one of whom had had a revolver; and that the unfortunate Sykut was put into the car at the point of the revolver and driven away. That was the kind of story that was told; and yet, remarkably enough, on December 18, when a sheriff's officer had gone to the farm before 7 p.m. to levy an execution against the appellant alone, and in order to ensure that he was not levying on partnership property the officer had asked: "Where is Mr. Sykut?" he was told: "Oh, Sykut has gone to a doctor at Llandilo." According to the evidence that was given he never went to a doctor at Llandilo, but at 7.30 that night he was supposed to have been kidnapped and taken to London. The appellant said in his evidence that he was expecting his partner back at the farm, and yet all the letters which he wrote at that time seem to say that his partner had gone to Poland and that he would not see him back; his letters can only be explained on the footing that he knew perfectly well that his partner could never appear again.

It seems to me that one of the matters of the greatest possible importance is that when the appellant was in London, telling all sorts of contradictory stories to the people from whom he was trying to borrow money, he made two remarkable proposals. First, he asked Mrs. Pokora, with whom he was evidently on terms of close friendship, to send him sham registered letters, that is to say, to get registered envelopes, put sheets of paper in them, and send them to him, purporting to send him a couple of hundred pounds. Another more remarkable proposal was that he actually asked that Mrs. Pokora's husband should go with him to see a solicitor at Llandilo and impersonate his partner. Could he have done that—would he have dared to do that, if he had thought that there was the smallest chance of this man appearing again? Yet he said in his evidence that he did expect Sykut to come back again. Sykut had new clothes and other property, and yet, if the appellant's story is true, he went off with these people, whether to Poland or somewhere else, leaving his clothes and everything behind and never came back or made any attempt to come back. Indeed, the appellant said that he knew one of the men, Jablonski—which I daresay is as good as any other name if one is using a Polish name—and that Mr. Jablonski had arranged to meet his partner at Paddington Station at 3 o'clock, on which day does not matter; that he went there and waited till 3 o'clock and that nobody came. Later, he said that he met Jablonski and Sykut at a Polish club and that there a document was signed; and that the signature said by the prosecution to be a forgery was affixed by Sykut in the presence of Jablonski and another gentleman; but nobody was called from the Polish club to say that these people ever existed at all.

I do not propose to go all through the evidence called, but one very remarkable piece of evidence cannot possibly be accounted for in any way other than that the appellant was deliberately trying to manufacture evidence with regard to the life of Sykut. That was the evidence of the local blacksmith. On December 14, the last day on which anyone saw Sykut alive, the appellant had taken a horse from the farm to the blacksmith for shoeing; the horse had been fetched away from the forge by Sykut, and the blacksmith had charged 17s. 6d. for shoeing the horse. The blacksmith's evidence was perfectly clear about that. He said that there was no doubt in his mind at all about it. Whether he referred to his books or not I do not know, but I think that he did; and it was on December 14 that Sykut came and took away the horse. Later in the month, at the end of December, when the police were beginning to make inquiries, the appellant visited the blacksmith and paid him the money, and he then tried to persuade the blacksmith to say that it was on December 17 that Sykut had gone there to take the horse away. The case for the prosecution was that Sykut was dead by the 17th, having been killed either on or immediately after the 14th. December 14 was the last day on which anybody had seen that unhappy man alive. Yet here was the appellant, at the end of December, when the police had begun to make inquiries, trying to get a man whose evidence on one point was vital, to give untrue evidence as to the date on which Sykut had fetched the horse. There can be no doubt about it; the blacksmith's evidence was either true or untrue. If it was true, the appellant was trying to get him to say something untrue.

Those are all matters which were pointed out to the jury by the judge, matters on which they had the advantage of hearing counsel on both sides. It is true that the judge did not point out to the jury all the matters. A judge does very often say to a jury: "It is very remarkable that such a point has not been "proved, and if it could be, it ought to have been proved." The case for the prosecution was: this man has disappeared: he has completely gone from the ken of mankind; it is impossible to believe that he is alive now. I suppose that it would have been possible for him to have got out of the country and become immured behind what is sometimes called the "iron curtain"; but here there are facts which point inevitably, as it is said irresistibly, towards the appellant being the person who knows what happened to the missing man and who disposed of that man in one way or another. It may be that it would have been desirable to emphasize to the jury that the first thing to which they must apply their minds was whether a murder had been committed; but, speaking for myself, I think that the way the judge put it in the two passages which I have read did sufficiently direct the attention of the jury to the fact that they had to be satisfied of that, and that if they were satisfied of the death, the violent death, of this man, they need not go any further. It is no doubt true that the prosecution relied considerably on certain minute spots in the kitchen—a minute quantity on the wall and a minute quantity on the ceiling—which were found to be blood when scientifically examined; spots so small that they might easily have escaped the attention of somebody who was trying to wash or wipe up blood. The appellant did not deny that the blood which was found was that of his partner. He said that it was due to the fact that his partner had cut his hand in the field, on one of the tractors, and that on coming in he must have shaken his hand and shaken off some blood. That, of course, was a possibility, and it was put to the jury. It was also a possibility that Sykut was disposed of in the kitchen; but there is no evidence that he was; indeed, as Mr. Elwyn Jones has very properly stressed, there is no evidence at all as to how the man met his death. But this court is of opinion that there was evidence on which the jury could infer that he did meet his death, and that he was dead; and if he was dead, the circumstances of the case point to the fact that his death was not a natural one. If that establishes, as it would, a corpus delicti, the evidence was such that the jury were entitled to find that the appellant murdered his partner.

For these reasons, we have been unable to find any misdirection by the judge, or anything in the summing up which would justify us in saying that the case was not properly presented to the jury. We have come to the conclusion that there was evidence on which the jury were entitled to find that the appellant's partner was murdered and that the appellant was the murderer, and accordingly this appeal is dismissed.

Appeal dismissed.

Solicitors: *D. S. Glasbrook, Llandilo; Director of Public Prosecutions.*

J. F. L.

ROBINSON v. RICHMOND (SURREY) BOROUGH COUNCIL.

1955
Jan. 18.

Lord Goddard C.J., Cassels and Streatfeild JJ.

Highways — Private street works — Footpath — New street coming into existence between 1938 *and December* 16, 1949—*Footpath not within section* 23 *of the Highway Act,* 1835—*Footpath a highway repairable by the inhabitants at large—Urban authority not entitled to make up under Private Street Works Act,* 1892—*Highway Act,* 1835 (5 *&* 6 *Will.* 4, *c.* 50), *ss.* 5, 23—*Private Street Works Act,* 1892 (55 *&* 56 *Vict. c.* 57), *s.* 7.

In 1938, by agreement with the local borough council, the developers of certain land abutting on the south side of a lane, a highway connecting two roads, set back the boundary fences of the plots 14 feet from the lane so as to leave a strip of land between the fences and the lane. No part of the strip was conveyed to the purchasers of the plots. The land sold was divided into plots abutting upon the strip and in course of time there was trodden down upon the strip a footpath between the plots and the carriageway. At all material times the part of the strip nearest to the lane consisted of a hedge planted with trees and shrubs. In July, 1953, the council, under the provisions of the Private Street Works Act, 1892, approved an estimate and provisional apportionment in respect of proposed private street works, consisting of a foot pavement six feet wide, upon the strip. The occupiers of the premises abutting upon the strip objected to the apportionment on the ground that the footpath was a highway repairable by the inhabitants at large and that, therefore, by section 7 (*b*) of the Private Street Works Act, 1892, the council had no power to make it up:—

Held, that there was evidence of dedication and acceptance by the public and accordingly the footpath had become a highway and as such was repairable by the inhabitants at large at common law unless it was removed from that class by section 23 of the Highway Act, 1835; that, since the Act of 1835 distinguished between a road and a footpath, section 23, which expressly stated that it applied to a road, an occupation way, a driftway and a horsepath, did not, on its wording, apply to a footpath; and that accordingly the common law position prevailed and the footpath in question was a highway repairable by the inhabitants at large and therefore, by section 7 of the Private Street Works Act, 1892, was exempt under that Act.

CASE STATED by Surrey Quarter Sessions.

The following were among the facts proved or admitted before quarter sessions: Before 1938 Petersham Road and Ham Street, Richmond, were connected by a highway called Sandy Lane, which was repairable by the inhabitants at large. On September 13, 1938, the borough council made an order under section 30 of the Public Health Act, 1925, declaring a certain length of Sandy Lane to be a new street for the purpose of the application of by-laws with respect to new streets. Subsequently the owners of certain land abutting on the south side sold the land in plots, but by arrangement with the council the boundary fences of the plots were set back 14 feet from the lane so as to leave a strip of land between the fences of the plots and the lane. No part of the strip was conveyed to the purchasers of the plots, and at all material times the part of it nearest to the lane, and being 8 feet in width, consisted of a hedge planted with trees and shrubs. The land sold was thereafter divided into premises each abutting upon the strip, and in course of time there was trodden down upon the strip a footpath between the premises and the carriageway.

On July 21, 1953, the council by resolution under the provisions of the Private Street Works Act, 1892, approved an amended estimate and provisional apportionment in respect of proposed private street works to be carried out in Sandy Lane consisting of a foot pavement 6 feet wide upon the strip between the boundary fences and the hedge. On objection by the frontagers occupying the premises abutting upon the strip, the justices approved the proposed plans and apportionment. The frontagers appealed to quarter sessions.

It was contended on behalf of the frontagers that the part of Sandy Lane in question did not form part of a street within the meaning of the Private Street Works Act, 1892, but was a highway repairable by the inhabitants at large, and that the frontagers on the northern side of the part of Sandy Lane proposed to be made up should be included in the provisional apportionment.

It was contended on behalf of the council that the part of Sandy Lane in question formed part of a street within the meaning of the Private Street Works Act, 1892, that it was not a highway repairable by the inhabitants at large, and that the whole of the strip of land 14 feet wide was a street within the meaning of the Act of 1892; and that the original highway known as Sandy Lane did not constitute " premises " within the meaning of the Private Street Works Act, 1892.

Quarter sessions found that by the development of Sandy Lane a new street came into existence, that the new street was a footpath and nothing more, and was divided from the highway by a strip of land owned by the developers or some other person or persons; that the new street or footpath was in existence prior to December 16, 1949; that the new street or footpath was a street for the purposes of the Private Street Works Act, 1892; that the whole of the new street or footpath was a highway repairable by the inhabitants at large under the common law, and was not removed from that class by virtue of section 23 of the Highway Act, 1835,[1] or sections 47 and 49 of the National Parks and Access to the Countryside Act, 1949, and by reason of the fact that the provisions of section 50 of the latter Act did not apply thereto so as to reserve to the council any right to make it up under the provisions of the Private Street Works Act, 1892. They also found that the strip of land between the existing carriageway and the part of Sandy Lane proposed to be made up or alternatively the existing carriageway (whichever adjoined or abutted upon the new street) were "premises" within the meaning of the Private Street Works Act, 1892, and should have been included in the provisional apportionment. They accordingly allowed the appeal. The council appealed.

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[1] Highway Act, 1835, s. 5: " . . . " in the construction of this Act . . . " the word ' highways ' shall be under- " stood to mean all roads, bridges " . . . carriageways, cartways, horse- " ways, bridleways, footways, cause- " ways, churchways, and pavements. " . . ."

S. 23: " . . . no road or occupation " way made or hereafter to be made by " and at the expense of any individual " . . . nor any roads already set out " or to be hereafter set out as a " private driftway or horsepath . . . " shall be deemed . . . to be a high- " way which the inhabitants of any " parish shall be compellable or liable " to repair, unless the person . . . " proposing to dedicate such highway " to the use of the public shall give " three calendar months previous " notice . . . of his intention . . . " and shall have made or shall make " the same in a substantial manner " . . . then . . . after the . . . high- " way shall have been used by the " public, and duly repaired . . . by " the person . . . for . . . twelve " calendar months, such highway " shall for ever thereafter be kept in " repair by the parish. . . ."

Private Street Works Act, 1892, s. 7: " . . . any owner of any pre- " mises shown in a provisional appor- " tionment as liable to be charged " with any part of the expenses of " executing the works may . . . object " to the proposals . . . on any of the " following grounds; . . . (b) That a " street or part of a street is (in " whole or in part) a highway repair- " able by the inhabitants at large;"

National Parks and Access to the Countryside Act, 1949, s. 49: " Sec- " tion 23 of the Highway Act, 1835, " . . . shall apply to any public path " dedicated after the commencement " of this Act " [December 16, 1949] " otherwise than in pursuance of a " public path agreement."

Robert Hughes for the council. Although there is no authority under the Private Street Works Act, 1892, there is authority under other Acts that where an added strip is, so to speak, thrown into a street by developers, it does not merge with the highway, and the paving expenses may be recovered from the frontagers: *Property Exchange Ld.* v. *Wandsworth Board of Works.*[2] The path in the present case is not of long standing, and under the old authorities, such as *Richards* v. *Kessick*,[3] retains its identity. [Reference was also made to *Reg.* v. *Cluworth* (*Inhabitants*).[4]]

There is no evidence of dedication. The path is not a footpath; it does not lead from one terminus to another, but is merely a trodden path running alongside part of the highway. It is not part of the original highway, and the mere fact that the public walked on it and trod it down does not make it a footpath repairable by the inhabitants at large. There was no user by the public of the strip when it was in the possession of the developer and the situation is the same as where the public walk across a bomb site.

If there was dedication, then it must have been of the whole strip 14 feet wide, not merely of the six-foot strip. This strip never has been repairable by the inhabitants at large and it does not necessarily follow that it is now: compare *Richards* v. *Kessick*.[5] The corporation took the land over to assist development and had it not been for the war would have been able to execute works under the Private Street Works Act at once. It cannot be suggested that it was repairable by the inhabitants at large at the moment when it was taken over, and there is no suggestion that between the time when the developers abandoned it to the public and the public walked on it, it changed its character. If a piece of land is dedicated as a footpath the inhabitants must take it in the state in which they find it and maintain it in that state; there is a distinction between a liability to repair it in that way, and when the work to be done comes within the Private Street Works Act. If the latter, then the Private Street Works Act applies.

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[2] [1902] 2 K.B. 61; 18 T.L.R. 464.

[3] (1888) 57 L.J.M.C. 48.

[4] (1704) 6 Mod.Rep. 163.

[5] 57 L.J.M.C. 48.

[LORD GODDARD C.J. There clearly is evidence of dedication here. The main question is whether section 23 of the Highway Act, 1835, applies.]

Douglas Frank for the frontagers. *Property Exchange Ld.* v. *Wandsworth Board of Works* [6] is not in point. The common law liability to repair exists in relation to this footpath as it existed before the passing of the Highway Act, 1835. Section 23 refers to roads and occupation ways only, but section 5 of the interpretation section carefully sets out numerous types of highway, and a footpath is mentioned in terms, clearly implying something different in kind from a road. Had section 23 been intended to apply to all the different types of highway it would have been expressly stated to do so, but it did not. Section 23, therefore, does not apply, so that the footpath is a highway repairable by the inhabitants at large and is outside the ambit of the Private Street Works Act.

LORD GODDARD C.J. This is a case stated by the Appeals Committee of the Surrey Quarter Sessions which raises a curious and new point under the Highway Act, 1835, and under the Private Street Works Act, 1892. The Private Street Works Act, 1892, enables a local authority to require frontagers upon a new street to make up the road or the path, but there is a provision in section 7 which takes outside the scope of the Act streets which are repairable by the inhabitants at large.

The facts found here by quarter sessions were these: When an old highway at Petersham called Sandy Lane was ripe for development, the developers intended that the houses and their forecourts should come out to a certain distance, and that between the houses and the old highway of Sandy Lane there should be a strip which would be used no doubt as the access to the houses. It is a strip along which the public can walk, and have walked, and the position which quarter sessions found, and which there was ample evidence to support, is that this strip was dedicated to the public and that the public had accepted it by walking along it and, therefore, it became a highway. It

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[6] [1902] 2 K.B. 61.

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may be that that was one of the consequences of the war which came very soon after the site had been laid out so that building did not start at once, but what the position might have been if other conditions had prevailed is a matter of no moment.

At common law a highway is repairable by the inhabitants at large. Anybody could dedicate a highway whether it was a road, or footpath or bridle path, and if the public accepted the dedication by using what the land owner offered, the highway became repairable at the expense of the inhabitants at large with all the ensuing consequences. That was found to be very inconvenient, for there were a great many highways in different parts of the country where no doubt building was going on and the public found that they were saddled with the expense of repairing these highways although it might be that they were only there for the convenience of two or three people. The Highway Act, 1835, was intended to remedy that state of affairs, and it provided by section 23 that the mere acts of dedication and acceptance of the dedication should not cast the burden of repairing the highway on the public, but that the highway would only become repairable by the inhabitants at large if, first of all, three months' notice was given by the dedicator that he intended to dedicate and before dedication he made up the road, and then it was accepted by the local authority. That having been done, the road becomes repairable by the inhabitants at large for ever after in the same way as it does under the provisions of the Public Health Act, 1875, or the Private Street Works Act, 1892, once the frontagers have paid for the making up of the road.

The difficulty that has arisen in the present case is that this footpath has existed as a footpath since 1938 at any rate, and is, therefore, a highway. The borough council in the purported exercise of their powers under the Private Street Works Act, 1892, have called upon the frontagers to make it up, and the frontagers say: "No, it is a highway which has become repairable by the "inhabitants at large and, therefore, we cannot be called upon "under the Private Street Works Act to do the work." We then turn to the Highway Act, 1835, to see whether or not this footpath is one of those highways to which section 23 of the Act applies so as to prevent it from becoming repairable by the inhabitants at large merely by dedication. It may be that it was intended that it should be such a highway, but it seems to me that the words of the Act are not wide enough to catch it. Section 5, the interpretation section, provides that: "The word "'highways' shall be understood to mean all roads, bridges, (not "being county bridges), carriageways, cartways, horseways, "bridleways, footways, causeways, churchways and pavements." All those are highways, but it will be observed that "highways" includes roads and also footpaths, so that the Act distinguishes between roads and footpaths. It says that a road can be a highway and that a footpath can be a highway. They are not the same things; for one is a road and the other is a footpath.

Section 23, the section which provides "When new highways "are to be kept in repair by parishes," applies to a road, an occupation way, a driftway or a horsepath; it provides: "be it "further enacted, that no road or occupation way made or hereafter to be made by and at the expense of any individual or "private person, body politic or corporate, nor any roads already "set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an Inclosure Act, "shall be deemed or taken to be a highway which the inhabitants "of any parish shall be compellable or liable to repair."

Quarter sessions held that footpaths are not included in that section. If that section had been intended to apply to every form of highway, it would have been very easy to have said so, for example, by saying: "Be it further enacted that no high-"way made or hereafter to be made shall be deemed to be "repairable by the inhabitants at large"; but the words in fact used are words which obviously exclude footpaths and, therefore, there being a finding that this footpath was dedicated to the public and that the public accepted the dedication, it follows that it became a highway at common law repairable by the inhabitants at large and, therefore, is exempt under the Private Street Works Act, 1892. I think that quarter sessions were right in the conclusion to which they came and for these reasons the appeal must be dismissed.

Cassels J. I agree.

Streatfeild J. I agree.

Appeal dismissed. Leave to appeal.

Solicitors: *C. Heyworth, Town Clerk, Richmond; Caporn & Campbell.*

J. F. L.

1954
Oct. 3, 4, 5;
Nov. 2.

Ormerod J.

C. A.

1955
Jan. 21, 24, 25, 26;
Feb. 7.

Denning, Birkett and Parker L.JJ.

WATT *v.* KESTEVEN COUNTY COUNCIL.

[1953 W. No. 555.]

Education — School — Provision of efficient education — Secondary grammar—Suitable education available in independent school—Parent's objection on religious grounds—Alternative school chosen by parent—Refusal of local education authority to pay full tuition fees—Duty of local education authority to "have regard to the "general principle" to educate in accordance with the wishes of parents—Meaning—Extent of local education authority's duty—Enforceable by Minister—Not for benefit of parents—No cause of action by parent—Education Act, 1944 (*7 & 8 Geo.* 6, *c.* 31), *ss.* 8, 68, 76, 81, 99 (1)—*Regulations for Scholarships and Other Benefits,* 1945 (*S.R. & O.* 1945, *No.* 666).

Statutory Duty—Whether civil right created.

Section 76 of the Education Act, 1944,[1] provides that local education authorities in the exercise and performance of their powers and duties under the Act "shall have regard to the general "principle that, so far as is compatible with the provision of "efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance "with the wishes of their parents."

The plaintiff, a Roman Catholic, declined on religious grounds to send his twin sons to an independent secondary grammar school in the defendant local education authority's area at which school the authority was prepared to pay the boys' tuition fees. He sent them instead to Roman Catholic boarding schools elsewhere and applied to the defendants for a grant to cover the whole cost of the tuition fees. The schools chosen by the plaintiff were efficient and the fees payable were less than those at the other school. The defendants refused to pay the full fees but made a grant towards them based on the father's income.

The plaintiff claimed that by failing to pay the full tuition fees at the school of his choice the defendants had failed in their duty under section 76 of the Act. He sought a declaration that the defendants were under a statutory duty to provide secondary grammar school education for his sons at the schools to which he had chosen to send them; an order of mandamus directing them to carry out their duty; and repayment to him of sums paid by him in tuition fees:—

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[1] Education Act, 1944, s. 8 (1): "It shall be the duty of every local "education authority to secure that "there shall be available for their area "sufficient schools . . . (*b*) for providing secondary education, that is "to say, full-time education suitable "to the requirements of senior pupils, "other than such full-time education "as may be provided for senior pupils "in pursuance of a scheme made under "the provisions of this Act relating to "further education . . ."

S. 76: "In the exercise and performance of all powers and duties "conferred and imposed on them by "this Act the Minister and local "education authorities shall have "regard to the general principle that, "so far as is compatible with the "provision of efficient instruction and "training and the avoidance of unreasonable public expenditure, pupils "are to be educated in accordance with "the wishes of their parents."

Held, that the duty of the education authority under section 8 of the Act of 1944 [1] was only to make schools available for all the children in their area, and they could perform that duty not only by maintaining schools which they themselves provided, but by arranging for places in independent schools. Once they had performed that duty in one or other of those two ways there was nothing more which they were bound to do. Education was only free in schools which the education authority thus made available. If a parent wished his child to enter a school of his own choice, with which the education authority had no arrangement, he could not claim as of right that the authority should pay the fees. He could only expect assistance according to his means. Section 76 of the Act must be read in connexion with the exercise of some power or duty contained in the Act. It only laid down a general principle to which the education authority must have regard, and it left open to the authority to have regard to other matters. The education authority were not in breach of that section and the claim failed.

Per curiam. The duty under section 8 to make schools available can only be enforced by the Minister and not by action at law.

Gateshead Union v. *Durham County Council* [1918] 1 Ch. 146 distinguished.

Decision of Ormerod J. affirmed.

ACTION.

The plaintiff, a Roman Catholic, was the father of twin boys, John and Richard Watt. The defendants, the Kesteven County Council, were the education authority under the Education Act, 1944, for the area of the parts of Kesteven in the county of Lincoln. There was in the area no school provided by the county council for secondary grammar school education and it was their practice, in the discharge of their duties under the Education Act, to pay the fees for boys qualified to attend an independent school known as Stamford School. The fees at that school were £60 10s. a year. The plaintiff agreed that it was an efficient school. The two boys had attended a Roman Catholic elementary school in Stamford until 1948, and were then sent by the plaintiff as boarders to Blackfriars School, Llanarth, Raglan, Monmouthshire, a private preparatory school owned by the Dominican Order. The combined fee at that time was £120 per annum, of which £50 was for tuition and £70 for boarding. That school was recognized as efficient by the Ministry of Education on June 22, 1951.

In December, 1950, the plaintiff's solicitor wrote to the chief education officer of the county council inquiring about arrangements which could be made for the boys to take the scholarship examination for 1951 and the conditions under which the plaintiff could obtain a grant of tuition fees. It was arranged that the boys should take the examination at a convenient school in Monmouthshire. The question of a grant was left over pending the result of the examination. In May, 1951, the boys passed the examination which entitled them to be provided with a secondary grammar school education. The plaintiff thereupon renewed his application for tuition fees; and on July 19, 1951, the county council wrote that they were not willing to make a grant at that stage but would be prepared to review the case if and when the boys were admitted to Blackfriars School at Laxton, a public school also under the control of the Dominican Order to which the plaintiff had expressed his intention of sending them. On November 27, 1951, the county council stated that on further consideration they had agreed to make an award " on the committee's approved scale of assistance " towards the cost of tuition fees, amounting to £10 per annum for each boy as from the autumn term of 1951.

On August 27, 1952, the plaintiff's solicitors informed the county council that the boys would be admitted to Blackfriars School in the autumn term of 1952 and again applied for a full grant of tuition fees, which at that school amounted to £60 and £81 for tuition and boarding respectively, with a reduction of £10 10s. in the boarding fees of the elder brother. On November 8, 1952, the plaintiff, at the suggestion of the chief education officer, amended his application to one for assistance for combined boarding and tuition fees, at the same time denying the right of the county council to base a grant towards tuition fees on an income scale. On December 3, 1952, the county council informed the plaintiff's solicitors that they had decided to make a total grant of £72, being £31 for the elder boy and £41 for the younger, for the school year ending July 31, 1953; but this did not satisfy the plaintiff. It was admitted by the county council that they were at all material times willing to provide places for the boys at Stamford School and by the plaintiff that he was at no time willing for his boys to go there.

The plaintiff claimed that under sections 8 and 81 of the Act and the Scholarships and Other Benefits Regulations, 1945, made thereunder, the county council were under a duty to provide secondary grammar education for his sons suitable to their requirements at no charge to the plaintiff, and that as the schools to which he had chosen to send his sons were admitted to be efficient and the fees payable were less than those at Stamford School, the county council, by refusing to make a grant to cover the full cost of tuition there were in breach of their duty under section 76 of the Act. He sought a declaration that the defendants were under a statutory duty to provide secondary grammar education at the schools in question, an order of mandamus directing them to carry out their duty and the repayment of sums he had himself paid as tuition fees.

The county council contended that they were at all times willing to provide secondary grammar education suitable to the plaintiff's sons at Stamford School and to pay the full tuition fees at that school. They denied any breach of section 76, contending that they had fulfilled their obligations under the Act and regulations by paying to the plaintiff the maximum grants possible under their scheme made under section 81 of the Act and the Scholarships and Other Benefits Regulations, 1945, made thereunder. They further contended that if they were in breach of duty under section 76, there was no cause of action enforceable by the court at the suit of the plaintiff, having regard to the terms of sections 68 and 99 (1) of the Act.[2]

Richard Elwes Q.C., *Henry Hope* and *Patrick FitzGerald* for the plaintiff.

Sir Frank Soskice Q.C. and *J. P. Ashworth* for the defendant authority.

Cur. adv. vult.

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[2] S. 68: "If the Minister is satisfied, either on complaint by any "person or otherwise, that any local "education authority . . . have acted "or are proposing to act unreasonably "with respect to the exercise of any "power conferred or the performance "of any duty imposed by or under "this Act, he may, notwithstanding "any enactment rendering the exercise of the power or the performance "of the duty contingent upon the "opinion of the authority . . . give "such directions as to the exercise "of the power or the performance of "the duty as appear to him to be "expedient."

S. 99 (1): "If the Minister is "satisfied, either upon complaint by "any person interested or otherwise, "that any local education authority ". . . have failed to discharge any "duty imposed upon them by or for "the purposes of this Act, the Minister "may make an order declaring the "authority . . . to be in default in "respect of that duty, and giving "such directions for the purpose of "enforcing the execution thereof as "appear to the Minister to be expedient; and any such directions shall "be enforceable, on an application "made on behalf of the Minister, by "mandamus."

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November 2, 1954. ORMEROD J. stated the facts and continued: Section 7 of the Education Act, 1944, provides that it shall be the duty of the local education authority to secure that efficient education as specified in the section shall be available to meet the needs of the population of their area. Section 8 provides that it shall be the duty of the authority to secure that there shall be made available in the area sufficient schools for the purpose. In the area administered by the defendants sufficient schools have not yet been made available and the defendants have in consequence acted under the powers given to them by section 81 of the Act and the regulations made thereunder which enable them, inter alia, to pay the whole or part of the approved fees and expenses of children attending schools, whether within or without the area of the authority, at which fees are payable. This has been done in general in the case of boys by paying the fees for them to attend Stamford School.

The plaintiff claims that he is entitled to a grant for the whole of the tuition fees he has paid to enable his boys to be educated at the schools to which he has chosen to send them. He bases his claim on section 76 of the Education Act.

[His Lordship read section 76 of the Act and continued:] Mr. Elwes, on behalf of the plaintiff, puts his case in this way: It is the wish of the plaintiff that his boys should be educated at the schools at which he has chosen to send them. It is not disputed that they have been and will be provided at these schools with efficient instruction and training, and as the fees for tuition are less than the fees charged at Stamford School unreasonable public expenditure will be avoided. Therefore, by refusing to pay the full tuition fees to the plaintiff, the defendants are in breach of their duty under section 76 and the plaintiff is entitled to recover this sum. That, I think, is a fair way of putting the plaintiff's contention in this case.

I may say at once—and this really disposes of the case—that I cannot accept this contention. If Mr. Elwes is right, the section must be read to mean that the local education authority shall provide education for pupils in accordance with the wishes of their parents subject to the two provisos contained in the section. This is not what the section says. It is expressed in much more general terms. It provides nothing more than that the local education authority "shall have regard to the general principle" that pupils are to be educated in accordance with the wishes of their parents. I do not, in order to decide this case, find it necessary to define the nature or extent of the duty which is put on education authorities by this section, nor would it be desirable for me to attempt to do so. It is enough to say that to accept the construction put on it by the plaintiff would be to strain unduly the meaning of the words, and if the legislature had intended the section to have the effect contended for by the plaintiff it would have been in much more precise terms than the somewhat vague ones which have in fact been used.

It was contended by Sir Frank Soskice, on behalf of the defendants, that even if the construction put on section 76 of the Act by the plaintiff is the correct one, the defendants have complied with their duty by making to the plaintiff the maximum payments they are empowered to make under the arrangements approved by the Minister under the regulations made in accordance with the powers given to the Minister under section 81 of the Act. In view of what I have said, it is not necessary for me to consider this question except to say that it does appear from the correspondence that, with the exception of the first year, when a contribution of only £10 in respect of each boy was paid, as against a maximum payment of £26 for each boy, the defendants have paid to the plaintiff the maximum sums in accordance with the arrangements. These arrangements, which were arrangements approved by the Minister under the regulations made under section 81, provide for assistance to pupils attending boarding schools and empower the defendants to make payments on a scale based on the income of the parents.

The remaining question with which I think I should deal is whether a breach of duty under section 76, assuming that there is one, can be enforced in this court. To decide that, it is necessary to see what sanctions, if any, have been provided by the Act for the enforcement of its provisions.

[His Lordship read sections 68 and 99 (1) and continued:] The principle on which this question is to be decided was stated by Lord Tenterden C.J. in *Doe* d. *Rochester* (*Bp.*) v. *Bridges*[1] as follows[2]: "where an Act creates an obligation, and enforces "the performance in a specified manner, we take it to be a general "rule that performance cannot be enforced in any other manner." These words were cited with approval by Lord Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council*,[3] a case concerned with the duty of a local authority to provide sufficient sewers under section 15 of the Public Health Act, 1875. The question was further discussed by Lord Simonds in *Cutler* v. *Wandsworth Stadium Ld.*[4] Perhaps that speech of Lord Simonds states as completely as is necessary for the purpose of this case the principles to be followed. That was an action at the suit of a bookmaker against the proprietors of the stadium to enforce what he regarded as his right to have a space provided for him where he could conveniently carry on the business of bookmaking, and it was held there that as the Betting and Lotteries Act, 1934, under which he claimed this right, provided a sanction for means of enforcing the provisions of the Act other than by recourse to the courts, the plaintiff had no remedy. In the House of Lords Lord Simonds said[5]: "The only rule which in all circumstances "is valid is that the answer must depend on a consideration of "the whole Act and the circumstances, including the pre-existing "law, in which it was enacted. But that there are indications "which point with more or less force to the one answer or the "other is clear from authorities which, even where they do not "bind, will have great weight with the House. For instance, "if a statutory duty is prescribed but no remedy by way of "penalty or otherwise for its breach is imposed, it can be assumed "that a right of civil action accrues to the person who is "damnified by the breach. For, if it were not so, the statute "would be but a pious aspiration But 'where an Act' (I cite "now from the judgment of Lord Tenterden C.J. in *Doe* d. "*Rochester* (*Bp.*) v. *Bridges*[6]) 'creates an obligation, and "'enforces the performance in a specified manner, we take "'it to be a general rule that performance cannot be "'enforced in any other manner.' This passage was cited "with approval by the Earl of Halsbury L.C. in *Pasmore* "v. *Oswaldtwistle Urban District Council.*[7] But this general "rule is subject to exceptions. It may be that, though a "specific remedy is provided by the Act, yet the person injured "has a personal right of action in addition. I cannot state that "proposition more happily, or indeed more favourably to the "appellant, than in the words of Lord Kinnear in *Black* v. *Fife* "*Coal Co. Ld.*[8]: 'If the duty be established, I do not think "'there is any serious question as to the civil liability. There "'is no reasonable ground for maintaining that a proceeding by "'way of penalty is the only remedy allowed by the statute.

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[1] (1831) 1 B. & Ad. 847.

[2] Ibid. 859.

[3] [1898] A.C. 387, 394; 14 T.L.R. 368.

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[4] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.

[5] [1949] A.C. 398, 407.

[6] 1 B. & Ad. 847, 859.

[7] [1898] A.C. 387, 394.

[8] [1912] A.C. 149, 165; 28 T.L.R. 150.

" 'The principle explained by Lord Cairns in *Atkinson* v. " '*Newcastle Waterworks Co.*[9] and by Lord Herschell in *Cowley* " ' v. *Newmarket Local Board*[10] solves the question. We are to " ' consider the scope and purpose of the statute and in par- " ' ticular for whose benefit it is intended. Now the object of " ' the present statute is plain. It was intended to compel mine " ' owners to make due provision for the safety of the men work- " ' ing in their mines, and the persons for whose benefit all these " ' rules are to be enforced are the persons exposed to danger. " ' But when a duty of this kind is imposed for the benefit of " ' particular persons, there arises at common law a correlative " ' right in those persons who may be injured by its contraven- " ' tion.' " Then he went on to consider other examples in the well-known cases of *Groves* v. *Wimborne (Lord)*[11] and *Monk* v. *Warbey*,[12] and, applying those principles in the case with which they were concerned at that time, concluded that the statute did not confer on the plaintiff the particular right to bring an action.

Mr. Elwes in the first place contends that as the sections I have referred to provide only that the Minister " may " and not " shall " or " must " make an order, the statute in any event provides no sufficient sanctions to enforce its provisions but merely gives the Minister a discretion; and, in the second place, that if we consider the scope and purpose of the statute and in particular for whose benefit it is intended, a right of action must arise if a parent has suffered damage by the breach by the authorities of any of their duties under the Act. I do not think that there is any real substance in the first contention. As I read the sections they appear to give sufficient powers to the Minister to enforce the performance of the duties imposed on the local education authorities and others by the Act. So far as the second contention is concerned, I think, too, that this cannot be sustained. The scope and purpose of the Act is to secure that efficient educational facilities shall be available to meet the needs of the population and that proper use shall be made of those facilities. It is the duty of the authorities to carry out the provisions of the Act to achieve that scope and purpose, and the Minister is provided with the necessary powers to ensure that this is done. It is not a statute intended for the benefit of parents in the sense that the Factories Acts or the Coal Mines Acts, for instance, are intended for the protection of workmen. There seems here to be

[9] (1877) 2 Ex.D. 441, 448.

[10] [1892] A.C. 345, 352; 8 T.L.R. 788.

[11] [1898] 2 Q.B. 402; 14 T.L.R. 493.

[12] [1935] 1 K.B. 75; 51 T.L.R. 77.

no reason why there should be a departure from the general rule which I have cited, and it follows therefore that if there is a breach of duty under section 76 it is not one which can be enforced by action in these courts. There must, therefore, be judgment for the defendants.

The plaintiff appealed.

Gerald Gardiner Q.C., *Richard Elwes Q.C.*, *Henry Hope* and *Patrick FitzGerald* for the plaintiff. This action is in the nature of a test case, brought to ascertain the rights of local parents. Under the Education Acts local education authorities are under a statutory duty to provide schools appropriate to the needs and abilities of the children in their areas. If in breach of their duty they fail to provide a school of a particular kind then, it is submitted, they are required to pay the tuition fees at an independent school under an arrangement made by them. The twin sons of the plaintiff had qualified by examination for secondary grammar school education. The defendant authority had provided no such school within their area, but they had arranged for places in the Stamford Grammar School, an independent school, and were willing to pay the tuition fees for the plaintiff's sons at that school. The plaintiff, on religious grounds, wished to send his boys to Blackfriars, a Roman Catholic school. The controversy for decision is this: under what circumstances and to what extent is a local education authority, being under an obligation to provide secondary grammar school education in a school which it maintains or by arrangement with an independent school, entitled to say: If you send your sons to the Stamford school we will pay the tuition fees, but if you send them to Blackfriars you will have to pay. It is the plaintiff's contention that, there being no question of efficiency and the fees at Blackfriars being a little less than those at Stamford, the parent can send his sons to any school he chooses, subject only to the question of public expense. Questions of the greatest importance to parents are raised by this case.

Since about the year 1350—possibly earlier—it has always been a general principle of the common law of England that children are to be educated in accordance with the wishes of their parents [see 4 Henry 4, c. 17], and it is necessary to consider what effect that statute has on the Education Acts. The Elementary Education Act, 1870, set up school boards, and section 5 provided that sufficient schools to accommodate all the children resident in the board's area should be provided. There is now a statutory duty upon parents to see that their children receive instruction, and by section 25 the school board might, if it thought fit, pay the whole of the fees payable at an elementary school if the parents were unable from poverty to do so. From a quite early period it was recognized that it would not be in accordance with the general principle of the common law if the local education authority were to make any condition that children should be educated at a school which did not suit the parents. Subject only to finance, a father has a legal right to control and direct the education and up-bringing of his children: see *In re Agar-Ellis*.[1] The principles are to be found in the judgment of Bowen L.J., and there is no indication that the old common law principle had been affected in any way by the Act of 1870. By the Education Act, 1902, s. 2, some provision was made for higher education. Another effect of that Act was to entitle parents to free education for their children. [*Gateshead Union* v. *Durham County Council*.[2]] In the 1920's Acts were passed which laid it down that the paramount consideration was the good of the children. It is submitted that if a common law lawyer were asked whether he thought it was right that the court should prefer the interests of the parents to the interests of the child, he would answer that he did not recognize dichotomy of interest. It is a misconception to assume that there is some conflict between the interests of the child and those of the father. The father is the natural guardian of the child and the best judge of his interests. Notwithstanding that the welfare of the infant is the first and paramount consideration the court, in deciding a question with respect to the custody or upbringing of the infant, cannot disregard the desire of its parent unless that parent has so neglected his duty as no longer to deserve consideration. (See *In re Carroll*.[3])

By section 81 of the Act of 1944 regulations are to be made by the Minister empowering local education authorities, for the purpose of enabling pupils to take advantage, without hardship to themselves or their parents, of any educational facilities available to them, to pay the whole or any part of the fees and expenses payable in respect of children attending schools at which fees are payable. It would have been a proper compliance with section 81, and the regulations, for the council to have paid the full tuition fees at the schools chosen by the plaintiff. The council having failed to provide secondary grammar school education in their area and limiting the payment of full fees to only one school, are in breach of their duty under section 76.

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[1] (1883) 24 Ch.D. 317, 334.

[2] [1918] 1 Ch. 146.

[3] [1931] 1 K.B. 317.

The words of that section are vague, but whatever the difficulties of applying the common law principle in relation to statutory provisions, Parliament has made it clear that nothing in the Education Acts is to ignore the common law principle, and that the Minister and the local education authority are under a statutory duty to observe the wishes of the parents. It is submitted that there is a prima facie case for drawing the inference that the education authority has not had regard to what they were told to have regard to. The council did not call any evidence and therefore the question remains whether the council either failed to carry out their statutory duty or else took into consideration something which they ought not to have considered.

There is nothing in the Education Act, 1944, to deprive the plaintiff of his cause of action in the courts. The principle laid down by the House of Lords in *Pasmore* v. *Oswaldtwistle U.D.C.*,[4] to the effect that where a statute specifically provides for the enforcement of a duty no other method of enforcement can be entertained, does not apply in the present case. In *Pasmore's* case [4] it was held that a breach by a local authority of its duty under section 15 of the Public Health Act, 1875, to make sewers could not be enforced by private persons by way of mandamus, as a remedy for neglect of the duty was provided by section 299 of the Act. That section was in unmistakable terms and was mandatory, whereas sections 68 and 99 of the Education Act, on which the defendants rely, are not mandatory but merely give the Minister an overriding administrative control. There is no specific method provided by the Act for the enforcement of the statutory duty. Moreover, it was held in *Cutler* v. *Wandsworth Stadium Ld.*[5] that the rule laid down in *Pasmore* v. *Oswaldtwistle* [4] was subject to exceptions and that where the Act itself was vague the decision whether or not there was a remedy in the courts must be taken after consideration of the scope and purpose of the whole Act. To hold that the whole purpose of the Education Act is simply to regulate the system of public education is to disregard entirely section 76, which was clearly included to safeguard the parents' wishes and must be regarded as "the parents' charter." The difficulty in any particular case is to decide whether, if a local education authority appears to be in breach of the section by

[4] [1898] A.C. 387; 14 T.L.R. 368.

[5] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.

ignoring the parents' wishes, it is justified in so doing. Such a course of action can only be justified if to follow the parents' wishes would lead to inefficient education or waste of public money. That would not be so in the present case. If the plaintiff's case fails then section 76 is for practical purposes a dead letter.

[The following cases were also referred to: *Groves* v. *Wimborne (Lord)* [6]; *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* [7]; *Blencowe* v. *Northamptonshire County Council* [8]; *Wilford* v. *West Riding of Yorkshire County Council* [9]; *Board of Education* v. *Rice* [10]; *Gillow* v. *Durham County Council* [11]; *Martin* v. *Eccles Corporation* [12]; *Sadler* v. *Sheffield Corporation* [13]; *Gillingham Corporation* v. *Kent County Council* [14]; *Healey* v. *Minister of Health* [15]; and *Solomons* v. *R. Gertzenstein.* [16]]

Sir Frank Soskice Q.C. and *J. G. Le Quesne* for the local education authority. The plaintiff's interpretation of section 76 reads into it much more than it states. It is not true to say that unless waste of public money or efficiency is at stake the local education authority is bound to comply with the wishes of the parents. The legislature has not used the words "shall "comply with," but "shall have regard to," and all authoritative interpretations of those words fall far short of that put upon them by the plaintiff. All that is required by the section is that the local education authority "shall have regard to the general prin"ciple . . . that pupils shall be educated in accordance with the "wishes of their parents." A principle is not a strict rule. All section 76 amounts to is that the local education authority must ask itself if it is consistent with its general scheme to follow the wishes of the parents and to prefer that course rather than one which does not. In the present case the defendants were faced with a fait accompli and a demand to pay the full fees at the schools chosen by the parents. They did in fact in respect of those schools pay the maximum amount which they could pay under a scheme drawn up by them under the Scholarships and Other Benefits Regulations, 1945, approved by the Minister, and therefore they fulfilled their duty to the plaintiff. They were willing at all times to pay the full fees for the two boys at the Stamford School, but they were not given the chance to do so.

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[6] [1898] 2 Q.B. 402.

[7] (1877) 2 Ex.D. 441.

[8] [1907] 1 Ch. 504.

[9] [1908] 1 K.B. 685.

[10] [1910] 2 K.B. 165; [1911] A.C. 179.

[11] [1913] A.C. 54.

[12] [1919] 1 Ch. 387.

[13] [1924] 1 Ch. 483.

[14] [1952] 2 All E.R. 1107.

[15] [1954] 2 Q.B. 221; [1954] 3 All E.R. 449.

[16] [1954] 2 Q.B. 243; [1954] 2 All E.R. 625.

There is no provision in the Act making it obligatory upon the defendants to provide secondary grammar education at specific schools. The duty of the local education authority is limited to ensuring that there are sufficient schools available in the area: see sections 8 and 9. It is for the plaintiff to show, beyond mere speculation, that the authority have not taken into consideration the general principle of regard for the parents' wishes.

If section 76 were to be interpreted in the way the plaintiff contends any educational system would become unworkable. It is said that the two provisos in the section do not operate in the present case, but if local education authorities could be called upon to pay full fees at other schools in all cases where the fees were less than at the maintained school and the education efficient, there would, it is submitted, be a waste of public money. The meaning of section 76 has nowhere been precisely stated, but it cannot have been meant to impose upon a local education authority a course of conduct which might have the result of leaving their maintained schools half empty because parents object on religious or other grounds to sending their children there.

In any event, even if the defendants are in breach of section 76, this is not a case where mandamus ought to be granted. In determining whether it will grant mandamus the court looks at the statute to see in the first place whether it makes provision for the enforcement of the duties thereunder. If so, that provision must be carried out and the court will not add to it. Generally the courts act with reluctance to enforce a purely personal duty: *Robinson* v. *Mayor and Corporation of Workington*[17]; *Peebles* v. *Oswaldtwistle Urban District Council*[18]; *Clark* v. *Epsom Rural District Council.*[19]

Section 99 of the Education Act is not very different from section 299 of the Public Health Act, 1875, which was considered in *Pasmore* v. *Oswaldtwistle Urban District Council*,[20] the locus classicus on this point. Under section 299 of the Public Health Act, 1875, the Local Government Board were not bound to proceed by order or by mandamus. Section 99 of the Education Act, under which the Minister may give directions, is obviously a section designed to deal with complaints by persons who consider themselves aggrieved by decisions of local education authorities, and it provides a remedy for dealing with them. The policy of the Act is for the person aggrieved to appeal to the Minister, and that is the obvious remedy having regard to the subject-matter of the Act. Where the provisions of an Act are vague, in deciding the persons who have a remedy for breach of its provisions regard must be had to the scope and purpose of the Act and in particular for whose benefit it was intended: see *Black* v. *Fife Coal Co.*,[21] *per* Lord Kinnear; *Cutler* v. *Wandsworth Stadium Ld.*,[22] *per* Lord Simonds. Applying that test to the present case, section 76 cannot be called "the parents' charter." The object of the Act is not to protect parents but to set up a system of education throughout the country. The Act is primarily for the benefit of children.

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[17] [1897] 1 Q.B. 619; 13 T.L.R. 148.

[18] [1897] 1 Q.B. 625; 13 T.L.R. 297.

[19] [1929] 1 Ch. 287; 45 T.L.R. 106.

[20] [1898] A.C. 387.

[*In re Collins* [23]; *Martin* v. *Eccles Corporation* [24]; and *Glossop* v. *Heston and Isleworth Local Board* [25] were also referred to.]

Cur. adv. vult.

February 7. The following judgments were read.

DENNING L.J. BIRKETT L.J. asks me to say that he has read the judgments which we are about to deliver and agrees with them. [His Lordship continued.] Mr. Watt lives at Stamford in Lincolnshire. He has twin sons, John and Richard, who are now just 15 years of age. They have passed the necessary examination which entitles them to a grammar school education. But there is as yet no State grammar school in that part of Lincolnshire: and on that account the Kesteven County Council arrange for the boys of their district to go to an independent school of high repute at Stamford, known as the Stamford School; and the county council pay the fees. In 1951, for instance, 44 boys went to the Stamford School and the county council paid the tuition fees of £61 10s. a year for each boy. In 1952, 30 boys at £63 15s. a year each. The county council are quite willing that the twin sons of Mr. Watt should go to the Stamford School as day boys, and to pay the full fees for them there. But Mr. Watt does not want them to go there. He is a Roman Catholic and wants to send them away to a Roman Catholic boarding school, and has already sent them there. He sent them to a Roman Catholic preparatory school in Monmouthshire and now they are at a Roman Catholic public school in Northamptonshire. These schools are recognized to be efficient, and the tuition fees (excluding the boarding fees) are a little less than those at Stamford. They are only £60. Mr. Watt claims that the Kesteven County Council are liable by law to pay the full tuition fees at these schools to which he has chosen to send the boys.

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[21] [1912] A.C. 149, 165.
[22] [1949] A.C. 398, 407.
[23] [1950] Ch. 498.
[24] [1919] 1 Ch. 387, 405.
[25] (1879) 12 Ch.D. 102.

I desire to say at the outset that the question in this case does not depend in the least on the religious views of the parent. The question would be the same if a member of the Church of England living in Stamford wished, for some reason or other, to send his boys away to a boarding school in some other part of the country. He might wish to send them there because it was his old school, or because the classics were well taught there, or because it was a co-educational school. The question in such a case would be just the same as this: Is the parent entitled to have the tuition fees paid by the county council?

The rival contentions can be simply stated: The county council say to the father: "If you wish to send your boys to a "school of your own choice, you are of course at liberty to do "so. Moreover, we are quite ready to help you with the fees. "It depends on what you can afford. We will see that you are "put to no hardship. If you are poor, we will pay the whole "fees. If you are well off, we will expect you to pay something "yourself." I pause to say that the county council are in fact paying quite a substantial part of the fees.

The father's retort is: "That would be all very well if you "had a State school in Stamford. I know that in that case, "if I did not choose to send them to that school, I could not "expect you to do more for me than you do. But you have "no State school in Stamford. All you do is to make arrange- "ments for the boys to go to an independent school in Stamford. "You pay the tuition fees for the boys who go to that school "without regard to the father's means. You should do the "same for me at whatever school I choose to send them."

The short answer to the father's argument is, I think, this: Whilst education is free in this country, it is only free at the schools which the county council make available. I can find nothing in the Act which compels the county council to pay the fees at any school which the father chooses. The duty of the county council is plain. They must make schools available for all the pupils in their area. But they can fulfil this duty, not only by maintaining schools themselves, but also by making arrangements with certain other schools. They may, for instance, make a grant to aid a school and in return get a right to a number of free places. Or they may make arrangements with some particular independent school to take the boys. At all the schools which the county council maintain themselves, no fees are payable. At the other schools with which they make arrangements, they must provide free places or pay the fees in full. Once they have fulfilled their duty in one or other of these ways —either by maintaining schools themselves, or by making arrangements with certain other schools—there is no more which they are bound to do. If a father wishes his child to go to yet another school of his own choice, with which the county council have no arrangements, then he cannot claim as of right that the county council shall pay the fees. He can then only expect assistance according to his means. Regulations have been made which empower the county council to pay the whole or any part of the fees in any case where it would involve financial hardship on the father to pay them.

I think that the position is clearly as I have stated it: but it was urged before us that independent schools stand in a special position. If the county council have no school of their own, or no grant-aided school to which to send the boys, but have to send them to an independent school, then it was said that the father has a right to choose which independent school they should go to; and, corresponding to this right, that the county council are bound to pay the fees in full.

This argument was based on section 76 of the Act. [His Lordship read the section and continued:] It is obvious that that section cannot stand by itself. It only applies in the exercise of some other power or duty contained in the Act. In this case it was said to apply in the exercise of section 8. It was said that, when there is no maintained or grant-aided school, the county council have a duty under section 8 to make available an independent school and to pay the fees in full: and that, in exercising that duty, they must under section 76 have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents. Hence if there are two independent schools, one in Stamford and the other far away, both of which are efficient and charge the same tuition fees, the pupil should be educated at the one desired by the parents. All the more so when the school chosen by the parents is the cheaper.

I think that that argument is mistaken. It assumes that the duty of the county council under section 8 is to make available for the pupils any of the independent schools over the length and breadth of the country. That is not correct. Their duty is only to make available the particular independent school with which they have made arrangements. They must make arrangements for an efficient independent school to take the pupils from their area. They must get the Minister's approval to these arrangements: and they must then offer this school to the parents. This duty was fulfilled by the Kesteven County Council when they made the Stamford School available. Having done this, there was no occasion for section 76 to come into operation at all.

Even if it was the duty of the county council to make available all the independent schools in the country, nevertheless I do not think that section 76 means that every parent has a right to choose any of them he likes. Section 76 does not say that pupils must in all cases be educated in accordance with the wishes of their parents. It only lays down a general principle to which the county council must have regard. This leaves it open to the county council to have regard to other things as well, and also to make exceptions to the general principle if it thinks fit to do so. It cannot therefore be said that a county council is at fault simply because it does not see fit to comply with the parent's wishes. And that is all that the father's complaint comes to in this case.

In any case I cannot myself see any evidence to suggest that the county council in this case did not have regard to the general principle. The correspondence which passed on the matter showed that it was specifically brought to their attention and nevertheless they thought that "they would place themselves in an impossible position vis-à-vis parents in other parts of the county if they were to do what has been asked of them." I can well see what they mean. If they paid the full fees in this case, it would mean that every parent in the county, who sent his boys to boarding school, could come and ask the county council to pay the tuition fees, no matter how rich he was. The father in this case is asking for preferential treatment for himself over and above the other parents who send their children to boarding schools. The county council only helps those other parents according to their means. They cannot reasonably be expected to do more for the plaintiff. They cannot pay his fees irrespective of his means when they do not do it for others.

This being so, the appeal must be dismissed: and there is no need to consider the question, which was much debated before us, whether a breach of section 76 gives rise to a cause of action for damages. It could not itself do so, but only in connexion with the exercise of some other power or duty in which the general principle was not observed. In view of *Gateshead Union* v. *Durham County Council*,[1] I would not like to say that there can be no cases under the Act in which an action would lie, but I do not think an action lies in this case. It is plain to me that the duty under section 8 (to make schools available) can only be enforced by the Minister under section 99 of the Act and not by action at law. That being so, a breach of section 76 in the exercise of section 8 can also be enforced by the Minister and not by action at law.

In my opinion, therefore, the appeal should be dismissed. It will be noticed that I have refrained from analysing the sections of the Act in detail, but Parker L.J. has done this. He will take up where I leave off.

Parker L.J. The plaintiff puts his case in this way: that it is the duty of the local education authority to make education available, which he contends means, in the case where sufficient maintained schools are not available, that the authority must pay full tuition fees at an independent school; that, in deciding what independent school the children are to go to, the authority is bound to have regard to the general principle set out in section 76; that, there being no question in this case as to efficient instruction or unreasonable public expenditure, the true inference from the facts proved is that the authority had no regard to that general principle; and that having suffered injury he has a cause of action for that breach of duty. [His Lordship read section 76 and continued.]

It will be seen that the obligation to have regard to the general principle is one to be observed by both the Minister and authorities in the exercise and performance of all their powers and duties under the Act. It is not an obligation which stands on its own, but the effect of the section is that there must be read into each provision of the Act conferring a power or imposing a duty an obligation in the exercise of that power or the performance of that duty to have regard to the "general principle." In the present case the duty in connexion with which that obligation is to be observed is section 8, which lays down the duty to secure that there shall be available sufficient schools. Accordingly in the performance of that duty an authority must have regard not only to the matters set out in subsection (2) of that section, but to that general principle.

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[1] [1918] 1 Ch. 146.

So far the position is, I think, clear, but the next step in the argument is the vital one, namely, that the obligation to secure that sufficient schools are available involves an obligation to pay full tuition fees at an independent school where sufficient maintained schools are not available. This is a vital point since if no such obligation arises in such circumstances the plaintiff's claim to be paid full tuition fees at an independent school of his choice fails in limine.

The answer to this question involves some analysis of the Act. Section 7 lays down the general duty of the authority to make efficient education available in its area to meet the needs of the population of that area. Section 8, to which I have referred, provides so far as it is material as follows: "(1) It shall "be the duty of every local education authority to secure that "there shall be available for their area sufficient schools . . . "(*b*) for providing secondary education, that is to say, full-time "education suitable to the requirements of senior pupils, other "than such full-time education as may be provided for senior "pupils in pursuance of a scheme made under the provisions of "this Act relating to further education; and the schools available "for an area shall not be deemed to be sufficient unless they are "sufficient in number, character, and equipment to afford for all "pupils opportunities for education offering such variety of "instruction and training as may be desirable in view of their "different ages, abilities, and aptitudes, and of the different "periods for which they may be expected to remain at school, "including practical instruction and training appropriate to their "respective needs." Section 9 gives the authority the necessary power to fulfil these duties. It is given power to maintain schools, whether established by it or not. Such maintained schools are either county schools which are established and maintained by the authority, or voluntary schools which are maintained but not established by the authority. Authorities are also given power "so far as may be authorized by arrange-"ments approved by the Minister to assist any . . . school which "is not maintained by them." This would include not merely grant-aided schools but independent schools.

Pausing there, it will be seen that, whereas duties and powers have been laid down with regard to making education "avail-"able," nothing has been expressly said as to whether such education is to be "free." Section 61 (1), however, provides: "No fees shall be charged in respect of admission to any school "maintained by a local education authority, or to any county "college, or in respect of the education provided in any such "school or college." Accordingly, education at maintained schools is to be free, but nothing is there said as to independent schools.

Section 81, however, enables the Minister to empower authorities to pay the whole or part of the fees payable at independent schools. So far as it is material, the section provides: "Regulations shall be made by the Minister empowering local "education authorities, for the purpose of enabling pupils to take "advantage without hardship to themselves or their parents of "any educational facilities available to them . . . (*b*) to pay the "whole or any part of the fees and expenses payable in respect of "children attending schools at which fees are payable." So far from any obligation being laid down that full tuition fees at independent schools are to be paid by authorities there is merely provision for the Minister empowering authorities to pay the whole or part of such fees. This he has done by Statutory Rules and Orders 1945, No. 666. It is unnecessary to refer to these regulations in detail. It is enough to say that under them every authority may, for the purpose of enabling pupils to take advantage without hardship to themselves or their parents of any educational facilities available to them, pay the whole or part of the tuition fees at independent schools as approved by the Minister.

As from July 14, 1953, however, when the Education Act of 1953 came into force, authorities became under an obligation to pay the whole of the tuition fees at an independent school with which arrangements had been made with the approval of the Minister for the provision of education. (See section 6 (2) (*a*) (ii) of that Act.) The position therefore seems to me to be this. Education at maintained schools is absolutely free. In all other cases prior to July 14, 1953, there was no right to free education but authorities could pay the whole or part of the expenses and fees approved by the Minister according to an income test. Subsequent, however, to July 14, 1953, there was an obligation to pay full tuition fees at an independent school if arrangements had been made with that school by the authority with the approval of the Minister. While, therefore, the authority was in this case prepared to pay full tuition fees at Stamford School, there was not until July 14, 1953, any obligation or authority to do so. There has not been, and is not now, any obligation on it to do so at any other independent school of a parent's choice. A parent can send his children to another school, but if so he can only get a contribution towards the fees based on an income test.

Strong reliance, however, was placed on *Gateshead Union* v. *Durham County Council*[2] and in particular on the following passage from the judgment of Swinfen Eady L.J.: "I am of "opinion that the Acts which require a parent to cause his "children to attend school give him the right to comply with "their provisions and enable him to insist that the child which "he tenders shall be permitted to 'attend' school—that is, to "be and remain at the school—during school hours and receive "the instruction which similar children receive, and that the "defendants have not any right to refuse to receive his child "unless they receive some payment or money contribution. He "is entitled to free education for his child—that is, education "without making any payment whatever. The accommodation "in the school cannot be said to have been made 'available' "for children if they are refused admission unless and until "their parents comply with some request to pay money which "the statutes do not confer upon the local education authority "any right to demand." It is to be observed that in that case there was an express provision (paragraph 5 of the Third Schedule to the Education Act, 1902) that the duty of authorities to provide a sufficient amount of public school accommodation, "shall include the duty to provide a sufficient amount "of public school accommodation, without payment of fees, in "every part of their area." In other words, the position in that case was just as if under the Act of 1944 an authority, contrary to section 61, sought to exact a payment by way of fees as a condition of a child attending a maintained school. If this conclusion is correct, that is an end of this case. The plaintiff is not entitled to full fees. The authority is in fact making a contribution and it is agreed that this court should not be concerned with the amount of the contribution.

As, however, the other points have been fully argued, it is proper that I should state my views shortly upon them. Assuming, therefore, that I am wrong in the conclusion I have reached, the next question is whether in offering to pay full tuition fees only at Stamford School the authority has failed to fulfil the obligation imposed on it by section 76. This depends, of course, on the true construction to be placed upon that section and upon the facts as proved at the trial. The wording is somewhat unusual, but this is clear, that some obligation is placed on the Minister and authorities. It was, I think, at one time contended on behalf of the plaintiff that the obligation to "have "regard to the general principle that . . ." meant that the authority must have exclusive regard to that general principle and, accordingly, that if and in so far as the parent's wishes were not incompatible with the two matters referred to, effect has to be given to these wishes. This, it seems to me, is plainly wrong, and indeed it was in the end admitted that there might be other matters which an authority could take into consideration.

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[2] [1918] 1 Ch. 146, 159, 160.

I say that it is plainly wrong because there must be a number of administrative matters—and the authority in exercising its powers and performing its duties is acting administratively—which one would expect it to be in a position to consider, and the wording used, and in particular the words "general "principle," contemplating as it does exceptions, point to the obligation meaning no more than that the authority must take into account the general principle, weighing it in the balance together with and against other considerations. Provided that the authority has regard to the general principle in this sense, I think that it fulfils its obligation. So far as the facts are concerned, I find it impossible to hold that the plaintiff has shown on a balance of probabilities that this authority has not complied with that obligation. I need not refer to the correspondence in detail, but I think that on a fair reading the inference is irresistible that the authority had regard to the general principle in the sense indicated above.

Finally, the point remains whether the breach of the obligation imposed by section 76 enables a parent who has suffered injury to bring a civil action. While it is plain that the breach of some provisions of the Act would not give rise to a cause of action, I am certainly not prepared to say that no breach of any obligation imposed by the Act affords a cause of action to a parent who has suffered damage. To do so would be to fly in the face of authority, and in particular in the face of the decision in *Gateshead Union* v. *Durham County Council*,[3] a decision of this court. It is necessary, I think, in every case to consider the duty in question and, where the allegation is that there has been a breach of section 76, to consider the duty in connexion with which it is shown that the provisions of section 76 have not been observed. Assuming, contrary to the conclusion I have reached above, that there is an obligation to pay full tuition fees at an independent school of the parents' choice, it seems to me that the *Gateshead* case[3] is directly in point and that an action would lie. On the other hand, if, as I think, the duty under section 8 is merely to secure that facilities are available, the only remedy for a breach of that duty would be by action by the Minister on complaint under section 99. I would dismiss the appeal.

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[3] [1918] 1 Ch. 146.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *O'Brien & Brown for Stapleton & Sons, Stamford; Bircham & Co. for J. E. Blow, Sleaford.*

A. W. G.

1954
Oct. 20.
McNair J.
C. A.
1955
Feb. 2, 3.
Lord Goddard C.J., Singleton and Romer L.JJ.

ALVION STEAMSHIP CORPORATION PANAMA *v.* GALBAN LOBO TRADING CO. S.A. OF HAVANA.

Shipping — Charterparty — Demurrage — " Weather working days " — Meaning—Eight-hour normal working period—Custom.

A charterparty for the carriage of sugar provided: " Lay days " at the average rate of . . . provided vessel can receive at these " rates per weather working day, Sundays and holidays and " Saturday afternoons excepted, shall be allowed to the said " charterers (if steamer is not sooner loaded) for loading and " waiting for orders. . . ." There was an established custom at the loading ports in question that the normal working periods were eight hours on a weekday and four hours on a Saturday:—

Held, that a " working day " was a length of time consisting of a number of hours which, according to the custom of the port, were usually worked at the port, and the word " weather " qualified it so that from the number of hours which would be the ordinary hours of the port was to be deducted the length of time during which the weather interfered with the work.

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

Branckelow Steamship Co. v. *Lamport & Holt* [1897] 1 Q.B. 570; 2 Com.Cas. 89 considered.

Decision of McNair J. affirmed.

SPECIAL CASE stated by an umpire.

By a charterparty for the carriage of sugar made between Alvion Steamship Corporation Panama, the owners of the *Rubystone*, and Galban Lobo Trading Co. S.A. of Havana, the charterers, it was agreed that the ship should proceed to Cuba "and there load, always afloat, at one or two safe ports on the "north side or at one or two safe ports on the south side as "ordered, . . . a full and complete cargo of . . . sugar in bags "not exceeding 7,000 tons . . . nor less than 6,300 tons . . . and "being so laden shall proceed with all convenient speed to "Piraeus" and there make delivery on being paid freight as stated. "Lay days for loading to begin at the next working "period according to the custom of the port after captain reports "ship ready to receive cargo. Sundays and holidays excepted . . . "Lay days at the average rate of 5,000 bags (of 330 lb) or "equivalent in 100 lb. bags at ports on the north side and Cienfuegos; 4,500 bags (of 330 lb.) or equivalent in 100 lb. bags at "other ports provided vessel can receive at these rates per "weather working day, Sundays and holidays and Saturday afternoons excepted, shall be allowed to the said charterers (if "steamer is not sooner loaded) for loading and waiting for "orders . . . . Time lost or saved is to be calculated separately for "each loading port and in accordance with the custom of the "port."

A dispute having arisen under the charterparty, the matter was referred to arbitrators, who, being unable to agree, appointed an umpire, who made an award which stated that, at the conclusion of the hearing before him, he was asked by the charterers' (respondents') arbitrator to state his award in the form of a special case "and to reserve for the decision of the court the following "question of law:—'Whether upon the facts found "'and upon the true construction of the charterparty and the "'weight of evidence the respondents were correct in applying "'the principle of a day of 8 hours, and 4 hours on Saturday "'to their computation of lay time.'"

The award then set out the following findings of fact:— "(*a*) That the said vessel loaded at Cardenas and Havana both "being ports on the north side of the Island of Cuba in conformity with the charterparty. (*b*) That the vessel loaded a "total of 162,690 bags of 100 lb. each as follows:—90,000 at

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" Cardenas 72,690 at Havana. (*c*) That the total laytime allowed " thereby to the charterers including allowances of rain and " winch breakdowns for loading the complete cargo, was 9 days " 6 hours 53 minutes comprising 5 days 3 hours 38 minutes at " Cardenas and 4 days 3 hours 15 minutes at Havana. (*d*) That " the vessel arrived at Cardenas at 11.54 a.m. on Sunday, " September 30, commenced loading at 1.45 p.m., October 1, " 1951, completed loading 4.45 p.m., October 8, 1951, thereafter sailing from that port on October 9 for Havana where she " arrived at 2.30 p.m. on October 10 (a recognized holiday) and " loading was finally completed at 3.20 p.m. on October 18, 1951. " (*e*) That at all material times there was an established custom " of the ports at Cardenas and Havana that the normal working " periods were as follows:—7 a.m. to 11 a.m. and 1 p.m. to " 5 p.m. = 8 hours. Saturdays—7 a.m. to 11 a.m. = 4 hours. " . . . Subject to the ruling of the court I award as follows:— " That the respondents are liable to the claimants in respect of " 29 minutes demurrage at Cardenas and in respect of 10 minutes " demurrage at Havana " which the umpire assessed at £9 13s. 5d. for the two ports. " . . . If the court should find and " determine that a weather working day at the loading ports is " one of 24 hours, contrary to my findings, then my award as " set out above, shall not stand, and instead thereof I find that " the claimants are entitled to demurrage in respect of 3 hours " 37 minutes at Cardenas and 3 hours 40 minutes at Havana, " making a total of 7 hours 7 minutes equal to £105 18s. . . ."

The following time sheet prepared by the umpire and annexed to his award relating to loading at Cardenas illustrates the method used by him of determining the demurrage.

S.S. Rubystone.

" Hours of work: 7 to 11 a.m.
1 to 5 p.m.

" CARDENAS Laytime Statement on basis of 8-hour working day.

" Arrived 11.54 a.m. Sunday, 30th September, 1951.

" Vessel preparing holds from 7 a.m. to 11 a.m. on Monday, 1st October.

" LAYTIME COMMENCES TO COUNT FROM 1 p.m. Monday, 1st October, 1951.

" Cargo loaded: 90,000 bags of 100 lbs. @ rate of 16,500 bags per weather working day.

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“ Time allowed for loading: 5 days 3 hours 38 minutes.*

			Days	Hrs.	Mins.
“ 1st October:	Monday—1 p.m. to 5 p.m.				
	(Less rain stoppage 40 mins.)			3	20
“ 2nd October:	Tuesday				
	(Less rain stoppage 15 mins.)			7	45
“ 3rd October:	Wednesday				
	(Less propn. winch 1/6th of 15 mins.)	3 mins.			
	Rain	1.45 mins.			
		1.48 mins.		6	12
“ 4th October:	Thursday				
	(Less propn. winch 1/6th of 20 mins)	3 mins.			
	Rain	35 mins.			
		38 mins.		7	22
“ 5th October:	Friday				
	(Less propn. winch 1/6th of 10 mins.)	2 mins.		7	58
“ 6th October:	Saturday—7 a.m. to 11 a.m.			4	0
“ 7th October:	Sunday—Time not counting.				
“ 8th October:	Monday—to 4.16 p.m.				
	Less Rain 15 mins.			7	01
	Laytime expires 4.16 p.m.				
			5	3	38

“ Demurrage

“ From 4.16 p.m. to 4.45 p.m. on Monday, 8th October, 1951. 29 minutes.

“ Loading Completed 4.45 p.m., 8th October, 1951.

“ Demurrage:—29 mins. @ $1,000 per day or pro rata = $20.14 @ 2.80 = £7 3s. 10d.”

Eustace Roskill Q.C. and *R. A. MacCrindle* for the shipowners (claimants). The only question open to the court on the special case is whether a weather working day is one of 24 hours, and, if so, whether one takes 24 hours from the commencement of work or from midnight on the first day. In computing a weather

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* Arrived at by calculating only 8 hours in a day.

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working day the custom found in this case is irrelevant, for it is not referable to weather working days but to working hours at the port. The shipowners are not entitled to count a day against the charterers unless the weather permitted working throughout that day or most of it. Scrutton on Charterparties, 15th ed., at p. 347, states: "Weather working days mean days on which "the weather allows working," which, it is submitted, correctly states the law. The phrase "weather working day" seems to have been introduced at the end of the nineteenth century; the first judicial consideration was in 1897 in *Branckelow Steamship Co.* v. *Lamport & Holt*,[1] the next in *Bennetts & Co.* v. *Brown*[2] in 1908. The *Branckelow* case[3] is cited in Scrutton for the proposition that the court has used the computation that if any substantial work is done, the day should be counted as a whole day or a half day according as the time exceeds a half a day or not. Lord Russell of Killowen C.J. did not there seek to define weather working day.

[McNair J. On *Branckelow Steamship Co.* v. *Lamport & Holt*,[3] if it was fine for eight hours and wet for 16 hours would that be a weather working day?]

On that authority if more than half a day's work were done it would count as a weather working day, but it is submitted that the better view is to deduct the 16 hours from the 24 hours, the whole of which would otherwise have counted.

No evidence of custom is admissible to contradict the plain meaning in a charterparty of weather working day. That phrase has an ordinary natural meaning as part of the English language; one has first to consider that ordinary natural meaning and then to see whether there is anything to rebut that ordinary meaning. *Bennetts & Co.* v. *Brown*[4] was followed in *Dampskibsselskabet Botnia A/S* v. *C. P. Bell & Co.*,[5] which really adds nothing to the earlier decision. In *"Z" Steamship Co. Ld.* v. *Amtorg, New York*[6] Goddard J. said: "I am quite satisfied in this case "that a 'day' for this purpose means what I call a calendar day "—a day of 24 hours."

The next question is whether there is anything to refute the natural meaning of the phrase weather working day. The umpire in his finding of normal working hours is merely pinpointing the starting point of the laytime. Once the laytime starts to run from an ascertained point of time, one then has to ascertain weather working days according to the natural meaning of the words. It will be contended by the charterers that weather working day has a customary meaning at the ports in question. The only finding in the case, wrongly called custom, is what the working hours are. It is submitted that a weather working day is a day of 24 hours. Days on which one finds that a substantial amount of work has been done are counted as weather working days. One looks to see whether on any particular calendar day, even during the night, weather prevents work.

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[1] [1897] 1 Q.B. 570; 2 Com.Cas. 89.

[2] [1908] 1 K.B. 490; 24 T.L.R. 199; 13 Com.Cas. 110.

[3] [1897] 1 Q.B. 570.

[4] [1908] 1 K.B. 490.

[5] [1932] 2 K.B. 569; 48 T.L.R. 93.

[6] (1938) 61 Ll.L.Rep. 97, 101.

[McNair J. Then if it was wet for 16 hours although fine during the working period, you say that would still not be a weather working day?]

That suggests that one must always interpret weather working day by the actual working hours, which would require a custom at the port to that effect.

The present form of charterparty is intended to apply to all cargoes of sugar from Cuba, and the Cuban decree fixing the hours of work applies to all the ports. It is only if the shipowners' contention that a weather working day is one of 24 hours is correct that it is necessary expressly to exclude Sundays, Saturday afternoons and holidays; the same applies to the express exclusion of shifting time. There is no authority to suggest that one interprets weather working day according to the rules at the different ports; the only fluctuation should be the weather.

A. A. Mocatta Q.C. and *Peter Bucknill* for the charterers. The award should be upheld because (i) a weather working day is a day during the ordinary or customary working hours of which weather permits working, (ii) by the custom of the port a weather working day has the meaning in (i). In construing "weather "working days" one must look, not only at the weather, but to the custom at the port. The umpire has made a finding that the custom at the port as to the computation of a weather working day is to ascertain the customary working hours in a day and then consider whether the weather has interfered with work during those hours. The authorities show that one can look at the custom of the port to construe "day," "working day" and "running day"; it therefore follows that one can also look at custom to construe "weather working day." In *Branckelow Steamship Co.* v. *Lamport & Holt*[7] there is a reference to 12

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[7] [1897] 1 Q.B. 570.

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hours; Lord Russell of Killowen C.J. there said[8]: "... the "most equitable view is ... to charge a full day against them "[the charterers] where substantially a full day's work, though "not amounting to 12 hours, is done." The judge there clearly did not have 24 hours in mind. *Bennetts & Co.* v. *Brown*[9] and *Dampskibsselskabet Botnia S/A* v. *C. P. Bell & Co.*[10] are not relevant. The passage in the judgment of Goddard J. in the "*Z*" *Steamship Co.* case,[11] although obiter, is also some support for the present submission, because he said "there is no evidence "here on which I can hold that 'days' means any particular "number of hours," and he then said that he was satisfied on the facts in that case that a day was 24 hours. Goddard J. was not there saying that a weather working day was prima facie 24 hours, but that he could not specify the hours because they worked all round the clock. With regard to the insertion of the words "Sundays and holidays excepted," the reason may be that they were put in ex abundante cautela or that they are mere surplusage. Surplusage often appears in commercial documents: *per* Devlin J. in *Chandris* v. *Isbrandtsen-Moller Co. Inc.*[12]

With regard to the question of custom, one must look at the special case as a whole to see what the umpire's findings were. Scrutton on Charterparties, 15th ed., at p. 346, states: "Evidence "of custom is admissible to explain the meaning of 'working "'day.'" The authority for that is stated in the footnote: "*British and Mexican Shipping Co. Ld.* v. *Lockett Brothers & "Co. Ld.*,[13] overruling *Bennetts & Co.* v. *Brown.*[14]"

[McNAIR J. According to that, custom could control the meaning of working day?]

Yes, and therefore it is submitted that it can equally control the meaning of weather working day. [Reference was also made to *Mein* v. *Ottmann*[15] and *Nielsen & Co.* v. *Wait James & Co.*[16]]

Roskill Q.C. in reply. There is no finding here of a customary meaning of weather working days. The umpire has taken as a custom that which local law has ordained; that is the antithesis of custom. "A custom is a reasonable and universal rule of "action in a locality, followed not because it is believed to be "the general law of the land or because the parties following it

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[8] [1897] 1 Q.B. 570, 573.

[9] [1908] 1 K.B. 490.

[10] [1932] 2 K.B. 569.

[11] 61 Ll.L.Rep. 97, 101.

[12] [1951] 1 K.B. 240, 245; 66 T.L.R. (Pt. 1) 971; [1950] 1 All E.R. 768.

[13] [1911] 1 K.B. 264; 16 Com.Cas. 75.

[14] [1908] 1 K.B. 490.

[15] (1904) 41 Sc.L.R. 144; 6 F. 276.

[16] (1885) 16 Q.B.D. 67; 2 T.L.R. 34.

"have made particular agreements to observe it, but because "it is in effect the common law within that place to which it "extends, although contrary to the general law of the realm": Scrutton on Charterparties, 15th ed., at p. 26.

There is no finding of a custom, and even if there is a customary meaning of working day, it is not authority for the meaning of weather working day. Although *Nielsen & Co.* v. *Wait James & Co.*[16] and the *British and Mexican Shipping Co.* case[17] may be good authority for deciding that there can be a customary meaning of working day, they did not decide that one can have a customary meaning of weather working day. The *Branckelow* case[18] was the first judicial consideration of weather working day, but the construction of the phrase was not finally settled in that case. It was finally decided by Walton J. in *Bennetts & Co.* v. *Brown*,[19] which has not been overruled by the *British and Mexican* case.[20]

McNair J. This case raises a question as to entitlement to demurrage under a well-known form of charterparty which is commonly used for the carriage of Cuban sugar to other ports. [His Lordship stated the facts as set out above and continued:] The first question is really the extent to which the umpire has left this matter to the court—whether, for instance, he has left to this court a question of the proper calculation of fractions of days and matters of that kind. I am clear that the only question which is left to me on this award is the short and naked question set out in the award, namely, whether, on the facts found, the charterers were correct in applying the principle of a day of eight hours and four hours on Saturday to their computation of laytime. Accordingly, in the manner with which I deal with this award, I express no view as to other subsidiary points of contest on the method of calculation, but confine myself solely to the question whether, in effect, in construing the phrase "weather "working days" one has, as the shipowners say, to have regard to a calendar day of 24 hours or whether, as the charterers submit, one has to have regard only to the working hours contained in such a calendar day.

As I understand the argument which was addressed to the umpire and to me, the charterers say that, inasmuch as at these two ports in Cuba there was an established custom or practice that the working hours on ordinary weekdays should be eight hours, specified in the way in which they are set out in the award, and that on Saturdays the working hours should be four hours, in any determination of whether a particular day was a "weather "working day" or not, wholly or in part, one considers the operation of weather during those working hours. They further say that even if that is not the true construction of the phrase "weather working days" standing alone, there is here in this award a definite finding of a customary meaning of the phrase "weather working days."

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[16] (1885) 16 Q.B.D. 67.

[17] [1911] 1 K.B. 264.

[18] [1897] 1 Q.B. 570.

[19] [1908] 1 K.B. 490.

[20] [1911] 1 K.B. 264.

I have been told by Mr. Roskill that the phrase "weather "working day" first came into use, so far as is recorded in the authorities, in the beginning of the century, and I have been referred to a number of cases concerned with "days," "working "days" and "weather working days." The argument on behalf of the shipowners may be summarized in this way: first, that the word "day" or "days," by authority, has been determined to mean a calendar day—a Monday, Tuesday, Wednesday or Thursday—and, further, that "working day" means a calendar day on which work is done, including the whole of that calendar day starting at midnight and continuing to the following midnight; and that "weather working day" similarly means a calendar day on which weather permits work, looking at the problem in relation to the whole of the 24 hours of the calendar day and not solely or particularly in relation to the working hours of that calendar day.

On the other hand, on behalf of the charterers it is said, in effect, that the whole conception of the words "working day" necessarily involves looking at the times during which work is done, and when one is considering "weather working day" the same approach is made: one has to consider, as regards a particular day, whether during the working hours the weather does, or would, interfere with the loading or discharging, as the case may be.

Of the authorities to which I have been referred, it seems to me that the first which has particular relevance on this point is *Branckelow Steamship Co.* v. *Lamport & Holt.*[1] In that case Lord Russell of Killowen C.J. had to consider (and I think it was the first time that it was considered in these courts) the meaning of the phrase "weather working day," and he used this language in his judgment[2]: "It is suggested by the plaintiffs "that when any substantial amount of work is done upon a

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[1] [1897] 1 Q.B. 570; 2 Com.Cas. 89.

[2] [1897] 1 Q.B. 570, 572.

" particular day the ship is entitled to reckon that as a whole " weather working day. I hope I am not contradicting any " authority when I say that I consider that contention to be " absurd. The charterparty provides that the charterers are " to have so many weather working days: suppose a particular " day to begin with fine weather and that two or three hours' " work is done; then the weather changes, and a state of things " arises in which it would be unreasonable for the charterers' " men to work at all: are the charterers to be charged with two " or three hours' work as a whole day? I think that such a view " is unreasonable and inequitable, and in the absence of any " binding authority in its favour I decline to assent to it." He then continued to discuss that problem with different solutions, and said [3]: " I think, however, that the most equitable view is " to charge half a day against the charterers where substantial " work is done, though not amounting to half a day, and to " charge a full day against them where substantially a full day's " work, though not amounting to twelve hours, is done; no " smaller fraction than half a day should, however, be taken " into consideration, and if the time worked is quite insignificant " it should not be charged at all."

It is quite clear, in my judgment, from that version of Lord Russell's judgment (and it would seem to be the corrected version of his judgment) that Lord Russell is saying that the question whether a particular day is to be considered a weather working day has to be determined by seeing to what extent the weather interfered with working during the 12 hours—12 hours clearly being the normal working hours at that time; and it would be quite inconsistent with his judgment to say that one has to look, not at the working hours, but at the 24 hours of the day. The matter is put quite clearly in that sense in the version of the judgment stated in the Law Reports,[4] and I for my part think a fair reading of the judgment in the Commercial Cases [5] also leads to the same result.

The matter is next considered in *Bennetts & Co.* v. *Brown*,[6] where there is a reported judgment of Walton J. which has in later years presented some difficulty, because it is quite clear that Walton J. there did refuse to accept as admissible evidence of a custom which appeared to him to control the meaning of the words " weather working days," because he said that "weather working days" had a perfectly natural meaning as days on which the work of discharging was not prevented by bad weather. But as far as I can understand Walton J.'s judgment in that case, there is nothing in it which is in any way inconsistent with the view which I have deduced to be the view of Lord Russell in the *Branckelow* case,[7] namely, that what one has to look at in determining the meaning of "weather working day" is the working hours and not the non-working hours. It seems to me that any other method of computation must involve this striking absurdity: for instance, assume that in a particular port the working hours are eight hours in the day and assume that the eight hours in the calendar day which precede the beginning of the eight working hours are rainy, and that the eight hours which follow the eight working hours are also rainy, but that the intervening eight hours of the working day are fine; it seems to me that on the shipowners' construction in such a case, even though the loading was not interfered with at all by rain because the ship had worked the ordinary hours of the port, yet the charterers would be entitled to say that there had not been wholly a "weather working day" because only one period of eight hours out of the three eight-hour periods in the day was uninterrupted by rain. That seems to be a result to which one should not be driven unless the clear language of the clause drives one to it. I do not find in this case that it does.

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[3] [1897] 1 Q.B. 570, 573.

[4] Ibid. 570.

[5] 2 Com.Cas. 89.

[6] [1908] 1 K.B. 490; 24 T.L.R. 199; 13 Com.Cas. 110.

The construction which is contended for by the charterers seems to me, with great respect to Mr. Roskill's argument, not to be inconsistent with the judgment of Goddard J. in *"Z" Steamship Co. Ld.* v. *Amtorg, New York*[8] but to be reinforced by it, because it is clear from the passage in Goddard J.'s judgment[9] that his decision was based wholly, as I understand it, on there being no evidence, at any rate in that case, that "days" meant any particular number of hours or that they should start at one time and end at another. Here the umpire on any view has found facts as to the working hours, and it seems to me that if similar facts had been before Goddard J. in that case his conclusion would have been the other way. I find that, purely as a matter of construction applied to the facts as found by the umpire, namely, applied to his findings of fact as to the working hours—whether it is right or wrong to call that a question of principle I know not—he has come to the right conclusion.

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[7] [1897] 1 Q.B. 570.

[8] (1938) 54 T.L.R. 849; 61 Ll.L.Rep. 97.

[9] 61 Ll.L.Rep. 97, 101.

It is put alternatively by the charterers that, whether that result be right as a matter of construction, the umpire here has, in fact, found a custom, and he has found a custom which controls the matter and which is not inconsistent with the meaning of the phrase "weather working day" uncontrolled by custom. I think, on reflection, that Mr. Roskill is probably right in submitting to me that the finding recited in paragraph (*e*), namely, that at all material times there was an established custom of the port that the normal working periods were as set out, does not really amount to a finding as to the customary meaning of the phrase "weather working day" and, accordingly, had I not thought that in the concept of the phrase "weather working "day" uncontrolled by custom there was a reference to "working hours of the port," I should not have been disposed to hold that this finding was sufficient to establish a customary meaning different from the meaning which I would have arrived at on that hypothesis as a matter of pure construction.

I have been referred to certain authorities, such as *Nielsen & Co.* v. *Wait James & Co.*[10] and others, to show that a custom is admissible to control words of this nature, but I do not think that the precise finding of the umpire here was intended to have, or does in fact have, that effect. Accordingly, it is not necessary for me to express a final view. But the point, of course, has been debated, namely, whether the decision of Walton J. in *Bennetts & Co.* v. *Brown*,[11] to which I have referred, can stand in view of the later decision of the Court of Appeal in *British and Mexican Shipping Co. Ld.* v. *Lockett Brothers & Co. Ld.*[12] The view has been expressed in Scrutton on Charterparties (11th ed., the last edition for which Scrutton L.J. and MacKinnon L.J. were responsible) that the latter case does overrule, or seems to overrule, the case of *Bennetts & Co.* v. *Brown.*[13] For my part it seems to me quite impossible that the two cases can stand together. I can see no distinction between them. If it had been necessary (which it is not) I should have felt myself bound to follow the later decision in the *British and Mexican* case[14] and disregard the earlier decision in *Bennetts & Co.* v. *Brown*,[15] notwithstanding the respect that any commercial lawyer shows for a judgment of Walton J.

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[10] (1885) 16 Q.B.D. 67; 2 T.L.R. 34.

[11] [1908] 1 K.B. 490.

[12] [1911] 1 K.B. 264; 16 Com.Cas. 75.

[13] [1908] 1 K.B. 490.

[14] [1911] 1 K.B. 264.

[15] [1908] 1 K.B. 490.

Accordingly, seeing that I have not been left any consideration of the details of the calculation but merely the question of principle, I affirm the award as set out by the umpire.

C. J. E.

The shipowners appealed.

Eustace Roskill Q.C. and *R. A. MacCrindle*, for the shipowners, substantially repeated the arguments advanced before McNair J. They also referred to *Love & Stewart Ld.* v. *Rowtor Steamship Co. Ld.*[1] and *Alexander & Sons* v. *Hansa.*[2] They further argued that even if a "weather working day" were to be regarded, not as a type of "day," but as a type of "working day," its duration in the absence of provision to the contrary remained 24 hours. A working day was an ordinary calendar day other than a Sunday or holiday and was a period of 24 hours, midnight to midnight, during part of which work was ordinarily done: *Orpheus Steam Shipping Co.* v. *Bovill & Sons.*[3] In a charterparty where lay time was fixed by a clause providing a formula for the calculation of its length, that lay time was ascertained without reference to either the normal working hours of the appropriate port or ports or to the periods during which shipowners or charterers were obliged or able to work. The charterers' construction would involve insoluble problems where lay time was expressed to be reversible and the normal working hours differed at the various ports of loading and discharge.

A. A. Mocatta Q.C. and *Peter Bucknill*, for the charterers, referred to *Nielsen & Co.* v. *Wait James & Co.*[4] [They were stopped.]

Eustace Roskill Q.C. replied.

LORD GODDARD C.J. This is an appeal from a judgment of McNair J. who upheld the award of an umpire in an arbitration which took place on the amount of demurrage to be paid by the charterers on a charterparty in respect of a ship called the *Rubystone*, which was engaged in the carriage of sugar from the island of Cuba to the port of Piraeus, the charterparty being on a printed form well understood in the trade, no doubt, and prepared for this particular trade.

The point at issue is really quite a short one, and it is mainly a point of construction. The umpire was a layman, not a lawyer,

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[1] [1916] 2 A.C. 527.

[2] [1920] A.C. 88.

[3] (1916) 114 L.T. 750.

[4] (1885) 16 Q.B.D. 67; 2 T.L.R. 34.

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and the special case is perhaps not stated quite in the way in which it would have been if a member of the Bar had been appointed to be the umpire. I think that McNair J. was perfectly right in the view he took that there is only one point which the umpire means to submit to the court, and that is, what is the meaning of the expression in the charterparty " weather working " days "?

Mr. Roskill in opening this case, no doubt in an endeavour to show us the importance of the point and how it arose, gave us a great many mathematical calculations which I do not find it necessary to go into, because once this point of principle is decided there is no question that the parties themselves could easily work out, if there be any doubt about it, the amount of the demurrage payable. The amount involved in this case is trivial, quite a few pounds, but the question is, no doubt, one of importance, because the shipowners and charterers are both engaged in this trade, and say that there is no decision directly on the point as to the meaning of the words to which I have referred, and they hope to get a decision upon them. There is also a case in which Lord Russell, when Lord Chief Justice, had to consider a matter very much germane to this case (although it does not, in our view, decide it), and we were asked in the course of the argument to express an opinion upon the judgment which the Lord Chief Justice gave in that case.

The charterparty was for the loading of a cargo of sugar in one or two ports in Cuba, either on the north or south side, and it provided, among other things, " Lay days for loading to begin " at the next working period according to the custom of the port " after Captain reports ship ready to receive cargo. Sundays and " holidays excepted. If ship arrives between 5 p.m. and 7 a.m., " time not to count till 7 a.m., or as customary at loading port."

Then comes the particular clause on which really this case turns: " Lay days at the average rate of 5,000 bags (of 330 lb.) " . . . at ports on the north side and Cienfuegos; 4,500 bags (of " 330 lb.) . . . at other ports provided vessel can receive at those " rates per weather working day, Sundays and holidays and Saturday afternoons excepted, shall be allowed to the said charterers " (if steamer is not sooner loaded) for loading and waiting for " orders." That shows how the lay days are to be calculated. It is also provided that stevedores for loading and discharging, recommended by the charterers or their agents, are to be employed at not exceeding current rates at the ship's risk and expense.

The only other clause which I need read for this purpose is: "If longer detained, demurrage to be paid at the rate of "$1,000 per day, or in proportion for any part of a day. Ship "to pay $500 per day, or in proportion, despatch money for "all time saved in loading and discharging. Such time lost or "saved is to be calculated separately for each loading port and "in accordance with the custom of the port."

The clauses which I have read all refer, except the clause with regard to the lay days, to the custom of the port, and they seem to me to be a pointer to the fact that in construing this charterparty one must have regard, in making the calculations, to the custom of the port.

The umpire arrived at the number of bags to be loaded by reference to a rate of 16,500, and no one disputes that method of calculation. The umpire also found that at all material times, as the established custom of the ports at Cardenas and Havana, which were the two ports at which the ship loaded, the normal working periods were as follows: 7 a.m. to 11 a.m., and 1 p.m. to 5 p.m.—that equals eight hours; on Saturdays, 7 a.m. to 11 a.m.—that equals four hours; and he then has set out the holidays which took place during the time, which would have to be excluded, and the time when the vessel was preparing her holds for the reception of cargo. The umpire, in calculating the time lost to calculate demurrage, has taken eight hours as a working day, and in each case he has made an allowance for the time on each particular day when work was suspended because of rain or other prevailing weather—and I think it is in all cases rain—and then, having deducted from the eight hours the time during which the men were stopped for rain, he has found the actual time by which this ship exceeded the lay days that were provided in the charterparty.

The whole question here depends upon the construction that is to be put on the words "weather working day." McNair J. has taken the same view as the umpire and has held that "working day" means a working day according to the hours customarily worked in the port. Mr. Roskill says that that is not right, and that a working day is a day of 24 hours, and, accordingly, if one takes a day of 24 hours, it means that the men could have worked a good deal longer than they did, and therefore he is entitled to a larger sum of demurrage than has been awarded.

In order that we may construe this clause in the charterparty, the first thing to ask is: What is meant by "working day"? If one finds the word "day" used, that is one thing; a day is a day of 24 hours, and one qualifies that by the use of the word "working," and I venture to think that if one says to a workman or to an employer of workmen: "What is your working day? "How many hours is your working day?" they would not say: "Twenty-four hours." That is not the working day; one is asleep for a good part of the 24 hours. To say that a working day is a period of 24 hours seems to me to ignore entirely the fact that the word "working" qualifies the word "day" and cuts it down, and, in my opinion, by the expression "working day" is meant the part of a day during which work is carried on. Therefore to determine a working day one has to find what are the customary hours or usual ordinary hours that are worked either at a particular place or in a particular trade.

If authority is needed for the proposition, which seems to me to be self-evident, one finds it in *Nielsen* v. *Wait*,[1] where Lord Esher—and he was considering the words "working days" and "running days"—said[2]: "'Working days' are distinguished "from 'days.' But I suppose and take it, that there might "be another dispute as to what 'days' would mean. If 'days' "are put in, there is sure to come some discussion about what "is the length of the day during which the charterer is obliged "to be ready to take delivery or the shipowner to deliver, because "the length of days may vary according to the custom of the "port."

If the length of day may vary according to the custom of the port, I take it that the length of working days may vary according to the custom of the port. One may get a port, as here, in which the working day is eight hours; one may equally, at some other port in some other part of the world, find that 12 hours is the working day, or 10 hours, as the case may be. In this case the umpire has found that eight hours is the working day.

Does the use of the word "weather" in front of those words "working day" in any way alter the construction which one would otherwise put upon "working day"? I think that it does to this extent. First, "weather working days" is an expression which appears to have come into use in shipping matters at about the end of the last century, somewhere about the 90's. There does not seem to be any doubt between the parties as to what the word "weather" means. It means from the working day, whatever it may be, is to be deducted the time which the men are stood off, or the loading is suspended, by reason of rain or other weather conditions—for example, there might be a hurricane, or something of that sort, to prevent work being done. It simply means that the working day is to be reduced by the time in which working is suspended by reason of the weather, and therefore, I think, apart from any authority, the umpire in this case calculated the demurrage on perfectly proper lines, and I agree with McNair J. in upholding his award, but it is necessary to say a word or two about some of the authorities on the point.

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[1] (1885) 16 Q.B.D. 67; 2 T.L.R. 34.

[2] 16 Q.B.D. 72.

One of the cases we have to consider is *Branckelow Steamship Co.* v. *Lamport & Holt* which is reported in the Law Reports [3] and in the Commercial Cases.[4] Speaking for myself, although there are one or two verbal differences, I cannot see that there is any real difference between the two reports so far as that which Lord Russell of Killowen C.J. there laid down is concerned. The headnote to the Law Report reads: "A charter-"party provided that cargo should be loaded at a certain rate per "weather working day. On certain days owing to bad weather "cargo could only be loaded for a few hours:—*Held*, that the "time so occupied in loading cargo was not to be reckoned against "the charterers as a whole, but as a part only, of a weather "working day. Where work is stopped by bad weather, but a "substantial quantity of work is done, though not amounting to "half a day, it is to be reckoned as half a day; where substantially "more than half a day's work is done, though not amounting to "a whole day, it is to be counted as a whole day; no smaller "fraction than half a day should be taken into the calculation."

I agree that the headnote accurately sums up Lord Russell's judgment. Perhaps I may read one passage which I think goes some way to destroy the force of Mr. Roskill's argument, and which certainly appeals to me, where Lord Russell said [5]: "It is "suggested by the plaintiffs that when any substantial amount "of work is done upon a particular day the ship is entitled to "reckon that as a whole weather working day. I hope I am not "contradicting any authority when I say that I consider that "contention to be absurd. The charterparty provides that the "charterers are to have so many weather working days: suppose "a particular day to begin with fine weather and that two or three "hours' work is done; then the weather changes, and a state of "things arises in which it would be unreasonable for the char-"terers' men to work at all; are the charterers to be charged with

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[3] [1897] 1 Q.B. 570.

[4] 2 Com.Cas. 89.

[5] [1897] 1 Q.B. 570, 572.

"two or three hours' work as a whole day? I think that such a "view is unreasonable and inequitable, and in the absence of any "binding authority in its favour I decline to assent to it. There "might be many days on which work was begun in the morning "but stopped in a short time because of rain, and, if effect were "given to the plaintiff's contention, the charterer might not in a "given case have half the number of days for loading to which he "was entitled under the charter. It would be more equitable to "reject the portion of a day from the calculation altogether, for "the ship would gain something in the way of despatch by reason "of the work done. I think, however, that the most equitable "view is to charge half a day against the charterers where sub-"stantial work is done, though not amounting to half a day, and "to charge a full day against them where substantially a full day's "work, though not amounting to twelve hours, is done; no smaller "fraction than half a day should, however, be taken into con-"sideration, and if the time worked is quite insignificant it should "not be charged at all."

So far as the meaning that the Lord Chief Justice was putting on the words "working days" is concerned, I agree with him; I think that the argument he uses is quite convincing, but he then applies what I may call a somewhat rough-and-ready rule, or a rule-of-thumb, and says: "If a small amount of work is done, "you are not to charge it as a day at all. If a substantial amount "of work is done, though not a full day, you are to charge half of it." With great respect to that great Lord Chief Justice, I cannot agree that that is a proper way of applying this particular clause. I do not see any ground upon which one can lay down a rule-of-thumb (if I may put it in that way) in the way in which he did. I think that the way in which the umpire has done it in this case is the right way: that is to say, he has taken the actual time on any particular day on which the weather has stopped work, and has deducted it from the day; so that he has taken a day, we will say a Monday, on which, in the ordinary way, the charterers would be entitled to eight hours, and he has said: "Yes, but then you "were stopped for [say] an hour, and therefore your day was "only seven hours, and therefore you get the advantage of that, "and that will prevent demurrage running against you which "otherwise might." I think that the umpire has calculated it rightly in this case, and I find it impossible to agree with the way in which the Lord Chief Justice dealt with the matter in *Branckelow's* case. I think that is importing into a contract an arbitrary rule which is not provided for in the contract. I dare say it might work substantial fairness between the parties, but the right way, I think, is to deal with the matter in the way in which the umpire has in this case.

There are only one or two other cases to which I think it is necessary to refer. Mr. Roskill has, very naturally, relied strongly upon the judgment of Scrutton J. in *Orpheus Steam Shipping Co.* v. *Bovill & Sons.*[6] Mr. Roskill referred briefly to the part of that case in which Scrutton J. said[7]: "A "day or running day is a consecutive day of the calendar from "midnight to midnight. You cut down a running day by speak-"ing of working day. It has been decided in several cases, and "the case of *Saxon Steamship Co. Ld.* v. *Union Steamship Co.* "*Ld.*[8] is one example, that a working day does not mean the "day on which the work is done, but a day on which it can be "done, and that a working day ordinarily is twenty-four hours "from midnight to midnight, part of it being the time in which "work is ordinarily done."

The point which the judge was dealing with was this: he says early in his judgment that the substantial point is, what does "working days of 24 hours each" mean? That was what the charter was dealing with in that case, working days of 24 hours each, and it is observable that when one turns to his well-known work on charterparties (15th ed., p. 346) the author says: "The number of hours in a working day on which a ship "must load must be settled by the custom of the port, or "express agreement." He cites *Orpheus Steamship Co.* v. *Bovill & Sons*[9] as authority for the meaning of the phrase "per "working day of 24 hours," and says: "*Held* to mean that "each 24 hours on which work was done was to count as a "conventional day, though the hours might be on several days. "It does not mean such a period of time as includes in it 24 "ordinary working hours of the port." For that the author cites the *Orpheus* case,[9] which seems to me to show quite clearly that the judge decided that case on the words "per working day of "24 hours." Of course, if a contract provides that a working day is to be regarded as 24 hours, that is an end of the matter, but otherwise I think that the statement which the author makes in the earlier part of the previous page, "The number of hours "in a working day on which a ship must load must be settled

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[6] (1916) 114 L.T. 750.

[7] Ibid. 750, 752.

[8] (1900) 83 L.T. 106; 16 T.L.R. 527.

[9] 114 L.T. 750.

"by the custom of the port, or express agreement," is exactly in accordance with the opinion that I have formed in this case.

I do not think that it is necessary to go through any of the other cases which have been cited, because they do not really deal with the point which we have to decide, and which is to some extent a question on which there has been no express decision before. No question is raised in the special case as to whether charterers are bound to have cargo ready on a day or at a time when weather prevented work, so I say nothing about this. For the reasons which I have endeavoured to give, I think that a working day is a length of time consisting of a number of hours which, according to the custom of the port, are usually worked at the port of discharge or loading, as the case may be, and the presence of the word "weather" seems to qualify it so that from the number of hours which would be the ordinary hours of the port is to be deducted the length of time during which the weather interferes with the work. I think that the prima facie meaning to be attributed to the words is strongly supported by the clauses which I read at the opening of this judgment, and in which I pointed out the number of places in which the custom of the port is referred to as a pointer, and a useful pointer, to enable us to decide the meaning of the words which are the subject of this appeal.

For these reasons, I think that this appeal fails and must be dismissed.

Singleton L.J. I agree that this appeal should be dismissed, and there is nothing that I wish to add to the reasons given by my Lord.

Romer L.J. I also agree.

Appeal dimissed.

Leave to appeal to House of Lords refused.

Solicitors: *Stokes & Mitcalfe; Stocken, May, Sykes & Dearman.*

1954
Nov. 11, 12;
Dec. 3.

Devlin J.

PHIPPS AND ANOTHER *v.* ROCHESTER CORPORATION.

[1952 P. No. 117.]

Licensor and Licensee—Dangerous premises—Child—Little child—Licensed to go over land—Open trench—Not fenced or guarded—Child injured while walking over land—Not accompanied by adult—Occupier's duty—Duty of parent.

On an October evening a boy, aged five, while out blackberrying with his sister, aged seven, walked across a large open space of grassland, part of a building site on which a housing estate was being developed by the defendants. Through the grassland a long deep trench had been dug for the purpose of laying a sewer, and into this the boy fell and broke his leg. The children lived, with their parents, in a house in a road adjacent to the open grassland. Children were in the habit of using the land, and the defendants had taken no steps to prevent them from so doing, but there was no evidence that little children frequently went there unaccompanied:—

Held, that children as a class were impliedly licensed to play on the grassland, and that the trench, though not an allurement or a danger concealed from an adult or a big child, was a danger imperceptible to a little child of the plaintiff's age; but that, although a licensor who tacitly permitted the public to use his land without discriminating between its members must assume that the public might include little children, he was entitled to take into account that reasonable parents would not permit their children to be sent into danger without protection; and that, as a general rule, he would have discharged his duty towards them if the dangers which they might encounter were only those which were obvious to a guardian or of which he had given warning comprehensible by a guardian. If the licensor knew or ought to have anticipated that there were places where children went unaccompanied on his land he might have to take steps accordingly, but the responsibility for the safety of little children rested primarily on the parents, whose duty it was to see that such children were not allowed to wander about by themselves or to satisfy themselves that the places to which they were allowed to go unaccompanied were safe.

The defendants ought not to have anticipated that the open space was a place in which little children would be sent out to play by themselves. They were entitled to assume that the parents would behave in a naturally prudent manner and satisfy themselves that the places to which they allowed their children to go unaccompanied were safe. Accordingly, although the infant plaintiff was a licensee on the defendants' land, the defendants had committed no breach of their duty towards him.

Dicta of Lord Shaw in *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44, 61; 38 T.L.R. 102 applied.

ACTION.

The following statement of facts is taken from the judgment:

In 1947 the defendant corporation began to develop a housing estate on the outskirts of Rochester on a site adjoining the Maidstone Road and to the east of it. The estate was a large one involving the laying out of roads and the erection of a considerable number of houses, and the whole operation covered some years. The land for the whole estate, which up to 1947 was being used as farm land, was taken over in stages as the building proceeded; and early in 1951 work began on a part of it (hereinafter referred to as site D) which was oblong in shape, bounded by the Maidstone Road on the western side and on the other sides by new roads laid out by the defendants and called Wake Road, The Tideway and Hawser Road. Immediately to the east of site D and bounded on the west by The Tideway was a site where the houses had already been completed, and in one of them the plaintiffs, Ian Richard Phipps, a boy aged five, and his father, Edward John Phipps, lived.

Site D was roughly 500 yards long by 100 yards wide. By October 1, 1951, the material date in the present case, only a comparatively small number of houses had been actually built and about 20 were still in the course of being built. The rest of the site, which up to the previous year had been farmed, was open grassland waiting to be built over. There were, however, two building works going on in the open space. One was a new road which was in the course of being excavated, and the other was the laying of a sewer. For this latter purpose a long deep trench had been dug right in the middle of the space about the beginning of September, 1951. The trench was at least 100 yards long, 8 or 9 feet deep and 2½ feet wide. The soil which had been taken out was heaped along one side to a height of about 4 feet. By October 1 the drain had been laid but the trench was still open.

In the afternoon of October 1, Yvonne Phipps, then aged seven, came back from school and took her brother, Ian, the infant plaintiff, aged five, to pick blackberries. They went by a roundabout way across the open space, and either going there or on their way back, found the trench across their route. They were, in fact, near one end of it, and the girl saw it and turned to go round the end. The boy, who was following behind her, fell in and broke his leg.

The plaintiffs, the father and the infant, suing through his father, claimed that the corporation was liable for the accident. They alleged that the defendants knew that children of tender years were in the habit of entering on the land, and in fact permitted them to enter, and that the building works upon the land were an allurement to such children. They further alleged that the defendants, their servants or agents, negligently failed to fence or guard the trench or to take any other steps to prevent children falling into it, and failed properly or sufficiently to fence the land, or to give warning by notice or otherwise, and that the infant plaintiff fell into the trench and was injured as a consequence of the defendants' negligence.

The corporation denied liability and alleged that the infant plaintiff was a trespasser on their land.

D. Van Oss for the plaintiffs.

P. M. O'Connor for the defendants. The infant plaintiff was a trespasser on the corporation's land and the defendants were under no greater duty towards him than to refrain from deliberately harming him or recklessly disregarding his safety. An occupier of land is under no duty to warn a trespasser of dangers on his land, so even if the open trench were a danger, which is denied, the defendants could not be held liable for the accident.

If it be found that the defendants permitted children to use their land, so that they became licensees, the defendants are still not liable for the accident. The duty of a licensor towards a child licensee is no higher than his duty towards an adult, that is, to warn him of a concealed danger or trap: *Hastie* v. *Edinburgh Magistrates* [1] and *Latham* v. *R. Johnson & Nephew Ld.*[2] The open trench was not a concealed danger but an obvious one, and there is no duty to give warning or protection against dangers which are themselves obvious: *Glasgow Corporation* v. *Taylor*,[3] *per* Lord Shaw.[4] It is true that where the licensee is a child, the doctrine of allurement comes into play, but that is the only exception to the general principle, and in the present case it is not applicable. The open trench was not an allurement as the heap of stones was in *Latham's* case [5] or as the turntable was in *Cooke* v. *Midland Great Western Railway of Ireland.*[6]

Alternatively, if a licence is to be inferred in favour of a small child, it will be a conditional one, the condition being that the child shall not come on to the premises unaccompanied by an adult or other suitable guardian. If he does come unaccompanied the occupier is not liable for injury caused by a danger which would have been obvious to an adult: *Burchell* v. *Hickisson*[7]; *Schofield* v. *Bolton Corporation*[8]; *Stevenson* v. *Glasgow Corporation*.[9]

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[1] 1907 S.C. 1102.

[2] [1913] 1 K.B. 398; 29 T.L.R. 124.

[3] [1922] 1 A.C. 44; 38 T.L.R. 102.

[4] [1922] 1 A.C. 44.

[5] [1913] 1 K.B. 398.

[6] [1909] A.C. 229; 25 T.L.R. 375.

[Reference was also made to *Reilly* v. *Greenfield Coal Co. Ld.*[10]; *Hardy* v. *Central London Railway Co.*[11]; *Liddle* v. *North Riding Yorkshire County Council*[12]; *Morley* v. *Staffordshire County Council*[13]; *Williams* v. *Cardiff Corporation*,[14] and to Salmond on Torts, 11th ed., p. 571.]

Van Oss in reply. If the infant plaintiff was a trespasser the defendants were guilty of a reckless disregard of ordinary humanity in leaving a deep trench entirely unprotected and without any warning where they knew that children of tender years were in the habit of playing: *Latham* v. *R. Johnson & Nephew Ld.*[15] But it is submitted that the plaintiff was a licensee. The defendants had knowledge that young children like the plaintiff habitually played on the land but they took no steps to show their resentment by trying to prevent the invasion: *Edwards* v. *Railway Executive*.[16] They did not even put up a notice, although that by itself might not have been sufficient to negative a licence: *Addie (Robert) & Sons Collieries Ld.* v. *Dumbreck*,[17] *per* Lord Dunedin.[18] The duty of an occupier of land towards licensees is well established and has been somewhat widened by *Hawkins* v. *Coulsdon Urban District Council*[19] to include dangers which a reasonable man would realize were dangers, even if the occupier himself has not.

The duty to a child licensee of tender years, even if generally the same, must be higher in degree and practice. The duty must be related to the actual class of person to whom the licence is extended. That is well established by the authorities. The question is, what amounts to a concealed danger or trap to that class of person? It is submitted that these are not confined to the class of dangers commonly known as allurements, where that which is obvious may nevertheless be a trap, but extend to dangers which, though obvious to adults, will be traps to very young children either because they do not appreciate the danger or because they are unable to deal with it. That does not go so far as to say that there is a duty on the occupier to make the land as safe as a nursery, which would be an untenable proposition. Nurseries do not contain deep unprotected trenches. In the present case there was a clear failure by the defendants to take reasonably practicable precautions in circumstances where it was obvious that an accident of this sort was likely to happen to a young child going on their land with their leave and licence.

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[7] (1880) 50 L.J.C.P. 101.

[8] (1910) 26 T.L.R. 230.

[9] 1908 S.C. 1034.

[10] 1909 S.C. 1328.

[11] [1920] 3 K.B. 459; 36 T.L.R. 843.

[12] [1934] 2 K.B. 101; 50 T.L.R. 377.

[13] [1939] 4 All E.R. 92; 66 T.L.R. (Pt. 1) 243.

[14] [1950] 1 K.B. 514; [1950] 1 All E.R. 250.

[15] [1913] 1 K.B. 398.

[16] [1952] A.C. 737; [1952] 2 T.L.R. 237; [1952] 2 All E.R. 430.

[17] [1929] A.C. 358; 45 T.L.R. 267.

[18] Ibid. 372.

[19] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97.

Cur. adv. vult.

1954. Dec. 3. DEVLIN J. stated the facts and continued: There is really no satisfactory evidence of how the infant plaintiff came to fall. It has been suggested that the edge crumbled, but I am not satisfied of that. There is no evidence that he and his sister were playing around the trench. I think that they were just walking—rambling perhaps—for children of that age do not make a business of getting from one point to another by the shortest possible route in the shortest possible time. I think that the infant plaintiff fell into the trench simply because he was not of an age to be certain of negotiating such obstacles safely without assistance. The plaintiffs claim that the corporation is liable for the accident.

A corporation developing an estate of this sort is faced with a problem. As soon as each house is completed it is filled up, probably by a family; and as the numbers of completed houses increase, there will be any number of children who want to run about and play over the space which is still left uncovered. The corporation may want to use the space for operations such as laying the drain which I am considering in this case. In small spaces in the centre of a town it is no doubt practicable to fence off the whole site, but in the case of a space such as this it would be an expensive thing to do and perhaps then not very satisfactory.

It is, however, only a new aspect of an old problem, and the principles which have to be applied have been considered many times. I have first to inquire whether the child is a licensee or a trespasser. It has been argued on his behalf that even if he was a trespasser, there was in this case such a reckless disregard of ordinary humanity as to impose liability upon the corporation. The point was not taken with much confidence, and it seems to me to be putting the case altogether too strongly. If the child was a trespasser, the defendants, in my judgment, succeed. If he was a licensee, I have to consider whether the duty owing to an infant licensee has been broken. As the argument developed, it became apparent that the two points were not entirely separate. But I shall begin by considering them separately, and shall deal first of all with the facts which are said by the plaintiffs to be sufficient to constitute an implied licence.

The evidence on both sides shows that children were in the habit of playing or trying to play in the houses that were under construction. If they did this during working hours, they were shooed away by the workmen. The workmen had all been given instructions not to allow anybody, whether children or adults, on to "the site." "The site" is a rather ambiguous expression, but in the light of all the evidence I think it must be taken to mean the plots on which building was going on. The main object of the instructions was to prevent pilfering of materials or damage to the work.

[His Lordship reviewed the evidence upon whether children frequented the open space, which was as yet not built over, and continued:] I am satisfied that throughout the summer of 1951 children from the neighbouring houses resorted to this open space. There is no evidence that they did so in great numbers, or that they swarmed over it or that it was anything like an organized playground. But I accept the evidence that they did go on it for the ordinary purposes for which children might be expected to use it. I think that this must have been apparent to the defendants' officials at the time, though I have no doubt that they have now forgotten it. I think that they must have seen enough of what was going on during the working day to make it plain to them, without using more than ordinary powers of imagination, that there would probably be quite a considerable use made of it at week-ends and in the evenings. I therefore find that the defendants did know that children were using the land.

But knowledge is not of itself enough to constitute a licence; there is a distinction between toleration and permission. The owner of moorland or downland, for example, in any favoured part of the country may know quite well that people are walking on his land for pleasure, but he cannot be held merely by that fact to licence them to do so. As it is put in Salmond on Torts, 11th ed., p. 571: "An occupier who resigns himself to the "occasional and perhaps inevitable presence of trespassers on his "property does not thereby take upon himself the obligations of "a licensor." I have to ask myself how the matter would be regarded by the reasonable man. There must be something more than casual trespassing by individuals who come once and perhaps never again. There must be a class of people who form something of a habit; and then one must ask oneself whether a reasonable owner would feel that unless he acted to stop the trespass, the belief would naturally be induced in those who used the land that they had his tacit permission to do so. This is a matter of degree which in the present case I do not find it easy to evaluate. It can be and has been argued that this was a short user, that there is no real evidence of any use before the Spring of 1951, and that it was a use that was temporary in character since the land was in process of being built over. But, on balance, I think that there is enough evidence to satisfy the test that I have propounded. It seems after all a very natural thing to allow children to play on open grass land which is not immediately required for any other purpose and which is just beside their homes, and I do not think that more than has been proved in this case is necessary to give rise to the assumption in the mind of the reasonable man that unless he does something to stop it, children will take it for granted that they are acting unobjectionably.

With this conclusion the stage is reached which was expressed by Lord Porter in *Edwards* v. *Railway Executive* [1] in these terms: "... no doubt where the owner of the premises knows that "the public or some portion of it is accustomed to trespass over "his land he must take steps to show that he resents and will "try to prevent the invasion."

On the facts of the present case the plaintiffs have, in my judgment, only to reach this stage to succeed on the point, for there is no evidence that the defendants in this case took any steps at all. I have already expressed the view that the instructions which they gave were intended and understood to be confined to the building plots. There is no evidence that any child was ever chased off the open space, and it would seem such a harsh measure that I think, if it had been done, that it would have been remembered. The fact is that the defendants have already lost this point by staking their case on the contention that there never were any children to chase off. It follows that they never took any steps to show that they resented the invasion.

I do not think that having reached that conclusion it is necessary for me to examine whether any steps which they might have taken would have been effective. A fence might not have been practicable in the circumstances. A notice might not have been sufficient to deter all or most children; but it would have made it plain to parents that children were not allowed and they might have taken the necessary action. At any rate it is, I think, only when the owner does something to show his resentment that the further question may arise whether what he does is in the circumstances enough. In this case it is sufficient for me to find that the defendants did nothing.

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[1] [1952] A.C. 737, 744; [1952] 2 T.L.R. 237; [1952] 2 All E.R. 430.

In truth, if the corporation had wanted to do something—if, for example, it had met to consider whether a notice should be put up—it is probably far from certain that any exhibition of resentment would have been generally approved. It might have been felt, justly or unjustly, that it would be a shame to keep the children off land that was not immediately required and that the corporation would have been adopting a "dog-in-the-manger" attitude if all that summer it had kept children off a natural playing ground for most of which it had no particular use. At any rate, the corporation cannot have the benefit of being indulgent towards children playing and at the same time of calling them trespassers: "people who will be publicly good-natured must pay the price," *per* Hamilton L.J. in *Latham* v. *R. Johnson & Nephew Ld.*[2]

I have, therefore, reached the conclusion that children as a class were licensed to play on the open space. Whether that licence extends unconditionally to the infant plaintiff in this case is a question which arose in the course of the argument, but not until after I had been invited by Mr. O'Connor to consider the nature of the duty towards children as licensees. The general duty towards a licensee is that of warning him of a concealed danger or trap. There is no duty to warn him of an obvious danger; that is, one which a reasonable man using proper precautions for his own safety would perceive for himself. But what test of obviousness does one apply when dealing with children, and what reasonable precautions are to be expected from them? Mr. O'Connor argued that this question was to be answered by the application of adult standards, except in so far as the doctrine of allurement afforded a special protection for children. On the facts of this case he contended that there was no allurement in the trench and that its dangers were obvious to an adult. The fact that work on a building estate was in progress and the heap of soil 4 feet high by the side of the trench would be ample warning to an adult, even before he saw the trench, that he must avoid it.

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[2] [1913] 1 K.B. 398, 421; 29 T.L.R. 124.

As to the facts, I accept Mr. O'Connor's submission. The trench was neither an allurement to a child nor a danger concealed from an adult or even from a big child. It was, however, a danger imperceptible by a little child of the plaintiff's age simply because he was not old enough to see the necessity of avoiding it or of taking special care; whether or not it was obvious to his eye, it was concealed from his understanding. The question of law is whether he is entitled to protection against that sort of danger.

Mr. Van Oss submits that, irrespective of any question of allurement, the duty towards little children should not be judged by adult standards. But he admits that the duty cannot be so high as to require the licensor to make the premises absolutely safe for them. The difficulty is to see upon what principle one stops short of that, once one gets away from the test of obviousness as perceived by the adult. A commonplace feature of a building or of land may be a danger to a little child; he may see much but apprehend little; he is usually impervious to warning. Is, then, the licensor, in the words of Hamilton L.J. in *Latham* v. *R. Johnson & Nephew Ld.*,[3] "practically bound to see that the "wandering child is as safe as in a nursery?" If the duty of a licensor towards such a child is converted into an obligation to make the premises safe, it means that the normal relationship of licensor and licensee has entirely ceased to apply.

The cases which deal with the licensor's duty towards children in general are well known. The law recognizes for this purpose a sharp difference between children and adults. But there might well, I think, be an equally well-marked distinction between "big children" and "little children." I shall use those broad terms to denote broadly the difference between children who know what they are about and children who do not. The latter are sometimes referred to in the cases as "children of tender "years." Not having reached the age of reason or understanding, they present a special problem. When it comes to taking care of themselves, there is a greater difference between big and little children than there is between big children and adults, and much justification for putting little children into a separate category. Adults and big children can be guilty of contributory negligence; a little child cannot.

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[3] [1913] 1 K.B. 398, 414.

I have not been able to find in the cases which have been cited to me any clearly authoritative formulation of the licensor's duty towards little children. I think that the cases do show that judges have not allowed themselves to be driven to the conclusion that licensors must make their premises safe for little children; but they have chosen different ways of escape from that conclusion. One way, which can be supported by many dicta, is to say bluntly that children, no matter what their age, should get no different treatment from adults. Children must themselves bear the risks attendant of childhood: "that is the way the world is "made," as Lord Dunedin said[4] in effect in one of the cases. That is the principle for which Mr. O'Connor contends in the first instance. Another way is to put upon the parents the burden of the contributory negligence which the child cannot himself bear. A third way is to treat the licence as being conditional upon the little child being accompanied by a responsible adult. That is a solution for which Mr. O'Connor contends in the alternative. A fourth way is to frame the duty so as to compromise between the robustness that would make children take the world as they found it and the tenderness which would give them nurseries wherever they go. On this view the licensor is not entitled to assume that all children will, unless they are allured, behave like adults; but he is entitled to assume that normally little children will in fact be accompanied by a responsible person and to discharge his duty of warning accordingly. The third and fourth solutions will in most cases produce the same result. They are, however, radically different in law, for in the former the unaccompanied child is a trespasser and in the latter a licensee.

I think that it is worth collecting from the principal cases the dicta in which these different views are developed. After they have been considered and compared I shall hope to be able to ascertain the principle on which the case before me ought to be decided.

One of the earliest cases was the one from which the formula of the conditional licence has been evolved. In *Burchell* v. *Hickisson*[5] one of the railings of a set which guarded a flight of steps leading to the licensor's house was missing; and the infant plaintiff, a boy, aged four, who was accompanied only by his sister, aged 12, fell and injured himself. A Divisional Court decided against his claim and Lindley J. expressed the principle as follows[6]: "There could be no duty on the part of the "defendant towards the plaintiff further than that the defendant "must take care no concealed danger exists. The plaintiff was, "no doubt, too young to see or guard against any danger, but "the logical way of considering the matter is to consider it "alternatively in this way: The defendant never invited such a "person as the plaintiff to come unless he was taken care of by "being placed in charge of others, and if he was in charge of "others then there was no concealed danger. In other words, "there was no invitation to the plaintiff if he was not guarded, "and if guarded, then there was no trap."

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[4] *Hastie* v. *Edinburgh Magistrates*, 1907 S.C. 1102, 1105.

[5] (1880) 50 L.J.C.P. 101, 102.

Hastie v. *Edinburgh Magistrates*[7] was the first of a group of three Scottish cases which have subsequently been referred to in the English reports, and is of special significance because Lord Dunedin was the Lord President. If I understand the law of Scotland correctly, there is a duty to use reasonable care whether the person affected is a licensee or an invitee: see *M'Phail* v. *Lanarkshire County Council*,[8] *per* Lord Sorn. But these cases show whether any special degree of care was thought necessary for a little child.

In *Hastie's* case[9] a child of four fell into a pond in a public park. The Lord Ordinary (Lord Salvesen) found that the water was "not dangerous to any person, old or young, who was capable "of taking care of himself." The claim failed. ". . . if a "child is so young as to be incapable of appreciating danger," he said, "it ought not to be allowed to be unattended."[10] The appeal also failed. The Lord President (Lord Dunedin) said: "The proximate cause was not the existence of the pond, but "the fact of the child being unattended."[10] If parents cannot provide nurses, "it is just one of the results of the world as we "find it."[11] Lord Kinnear said[12]: "Children cannot be left "by their parents to play in public places except subject to the "risks which must necessarily be attendant on such places."

In *Stevenson* v. *Glasgow Corporation*[13] a small child fell into a river in a public park and was drowned. Lord Kinnear said[14]: "But there is no authority for imposing on the proprietors or "managers of public parks a duty to protect children from such

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[6] 50 L.J.C.P. 101, 102.
[7] 1907 S.C. 1102.
[8] 1951 S.C. 301, 307.
[9] 1907 S.C. 1102.
[10] Ibid. 1105.
[11] Ibid. 1106.
[12] Ibid.
[13] 1908 S.C. 1034.
[14] Ibid. 1043.

"risks as are incident to their childhood. . . . The only real "security is that children who are too young to take care of "themselves should be taken care of by somebody else." And later he said[15]: "It is impossible to lay upon the defenders a "duty to protect children from risks which arise only from their "own childishness and helplessness. That is the office of their "parents or guardians." Lord Mackenzie said[16] that the danger was an obvious one and that the proximate cause of the accident was that a child of tender years went there unattended. ". . . if "the child was in a position to take care of itself the same "standard must be applied as would be applied in the case of "an adult. If the child was so young as not to be able to take "care of itself, it should never have been allowed to go there "unattended. . . ."[16]

In *Reilly* v. *Greenfield Coal Co. Ld.*[17] a tramway owned by the defendant colliery crossed a farm road which was freely used by the public, and a child of four was killed. The Lord Ordinary (Lord Johnston) held that any risk from the tram lines was so obvious to an adult as to be regarded in the light of a "seen "danger." He said[18]: ". . . the patent risk, or 'seen danger,' "which would have been pleadable against an adult capax does "not avail against the deceased child. The plea of 'seen danger' "is just one form of contributory negligence. And I doubt "whether contributory negligence can be predicated of a child "of three years and eleven months." The Lord Ordinary then went on to determine that there was no parent's negligence, which, he said, would be attributable vicariously to the child to bar the claim. The claim therefore succeeded; and an appeal failed. The judgment of Lord Kinnear may be contrasted with what he said in the earlier cases. He said[19]: "I should come "to the conclusion myself upon the evidence that there was "really no considerable danger to any active and intelligent man "who might cross this road and who was taking reasonable care "of himself. But people who run wagons of the kind I have "described across a frequented road are bound to take into "account that the persons using it may include aged or infirm "people or very young people, who are not so well able to take "care of themselves as ordinary active and intelligent men are. "Therefore, I think, that when they have the misfortune to run "over a child, which from its tender years is quite incapable of

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[15] 1908 S.C. 1034, 1045.
[16] Ibid. 1046.
[17] 1909 S.C. 1328.
[18] Ibid. 1333.
[19] Ibid. 1339.

"taking care of itself, it lies with them to show that they had "taken every reasonable precaution which ordinary foresight and "skill would suggest to prevent such a calamity."

Cooke v. *Midland Great Western Railway of Ireland*[20] is the case in which the House of Lords allowed the claim of a child of four who was injured on the railway turntable. It is the classic case of an allurement and, therefore, within the exception to the principle for which Mr. O'Connor contends. I refer to it only to cite a dictum by Lord Atkinson[21] which shows that, in his view, the duty imposed on the licensor is relative to the capacities of the licensee: "The principle that the owner of "land upon which a licensee enters on his own business, or for "his own amusement, is only responsible for injuries caused to "the latter by hidden dangers of which the former knew, but of "which the licensee was ignorant and could not by reasonable "care and observation have detected, must, in any given case, "be applied with a reasonable regard to the physical powers and "mental faculties which the owner, at the time he gave the "licence, knew, or ought to have known, the licensee possessed. "To the blind the most obvious danger may be a trap. To the "idiotic the most perilous act may appear safe and cautious. "The duty the owner of premises owes to the persons to whom "he gives permission to enter upon them must, it would appear "to me, be measured by his knowledge, actual or imputed, of "the habits, capacities and propensities of those persons."

Lord Atkinson then sets out the doctrine of allurement, treating it as an application of this principle. Upon this view the doctrine is not an exception to the application of a universal adult standard, but an illustration of the principle that the standard is not invariable but depends upon the capacities of the licensee.

In *Schofield* v. *Bolton Corporation*[22] children were in the habit of playing on the licensor's field, and a gate which led from the field to the railway line was left open. The infant plaintiff, who was aged 21 months, got on to the railway line and was injured by a train. Vaughan Williams L.J. held that there was no evidence that the invitation given by the licensor was to children of such tender years. There was nothing to show that permission to play in the sandpit exposed to danger any child whom reasonable people would allow to run about by itself. The real cause of the accident was the gross neglect of the father and mother. Farwell L.J. said that the invitation was not given to children who were so young as not to appreciate the danger of a passing train.

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[20] [1909] A.C. 229; 25 T.L.R. 375.

[21] [1909] A.C. 229, 238.

[22] (1910) 26 T.L.R. 230.

In *Latham* v. *R. Johnson & Nephew Ld.*[23] a child of two was injured while playing on a heap of paving stones in waste land belonging to the defendants; one of the stones apparently fell on her hand. The jury found, first, that children played on the land with knowledge and permission; secondly, that there was no invitation to the plaintiff to go on the land unaccompanied; thirdly, that the defendants ought to have known that there was a likelihood of children being injured by the stones; and, fourthly, they did not take reasonable care to prevent such injury. From these findings it would appear that the child was a trespasser inasmuch as she was on the land unaccompanied. The trial judge, Scrutton J., nevertheless entered judgment for the plaintiff; Hamilton L.J.[24] thought that the trial judge had wrongly assumed that the jury only meant that there was no invitation to this particular child unaccompanied, though there was to others; even so, the Lord Justice thought that the effect on the claim would be the same. At any rate, in the Court of Appeal the case was argued on the basis that the child was a licensee: see *per* Farwell L.J.[25] and Hamilton L.J.[26] Mr. Sutton, for the plaintiff, submitted that there was no obligation upon the defendants to take more care than for an adult. Upon this Farwell L.J. said[27]: "I am not aware of any case that imposes any "greater liability on the owner towards children than towards "adults: the exceptions apply to all alike and the adult is as "much entitled to protection as the child. If the child is too "young to understand danger, the licence ought not to be held "to extend to such a child unless accompanied by a competent "guardian: see *Burchell* v. *Hickisson*[28]; *Schofield* v. *Bolton* "*Corporation*[29]; and *Stevenson* v. *Glasgow Corporation.*"[30]

Hamilton L.J. said[31]: "If his injury is not to go without "legal remedy altogether by reason of his failure to use a "diligence which he could not possibly have possessed, the "owner of the close might be practically bound to see that the "wandering child is as safe as in a nursery. The way out of

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[23] [1913] 1 K.B. 398.

[24] Ibid. 415.

[25] Ibid. 404.

[26] Ibid. 415.

[27] Ibid. 407.

[28] 50 L.J.C.P. 101.

[29] 26 T.L.R. 230.

[30] 1908 S.C. 1034.

[31] [1913] 1 K.B. 398, 414.

"the dilemma was found in *Burchell* v. *Hickisson*[32] by deciding "that the circumstances may evidence the attachment of a "condition to the licence or permission to enter, namely, that "the child shall only enter if accompanied by a person in charge "capable of seeing and avoiding obvious perils and thus of "placing both himself and his charge in the position of an "ordinary licensee both able and bound to look after himself." The Lord Justice then quoted from the judgment of Lindley J. and added[33]: "Logically this principle is applicable to all cases "of infirmity or disability and not to infants only." He decided the case, I think, on the ground that "the child's permission to "be there at all was conditional, and the condition was not "performed."[34] At the end of his judgment[35] he treated the answer to the second question as decisive.

Hardy v. *Central London Railway Co.*[36] was a case in which a child of five and a half in charge of an older boy was injured playing on a moving staircase, and the question was whether the warnings given to children were enough to negative a licence. It was held that they were and that the child was merely a trespasser. The case is, therefore, only indirectly relevant and I cite it mainly for the comment by Bankes L.J.[37] on Farwell L.J.'s judgment in *Latham* v. *Johnson*,[38] which comment is as follows: "'Farwell L.J. says[39] that he is not aware of any case "'that imposes any greater liability on the owner towards "'children than towards adults.' This is no doubt true, but in "accepting the proposition the fact must not be lost sight of "that a very different inference may have to be drawn from "facts when dealing with the case of an infant, than when "dealing with the case of an adult. For instance, what may "amount to an effective warning to an adult may be no warning "at all to an infant." Later Bankes L.J. says[40] that the elder boy, in whose charge the plaintiff was, certainly appreciated the warnings and probably the plaintiff did also, but in any event the plaintiff was not entitled to be put into a better position than the boy in whose charge he was.

In *Glasgow Corporation* v. *Taylor*,[41] an appeal from the Court of Session to the House of Lords, a boy aged seven died from eating the berries of a poisonous shrub in public gardens owned by the Glasgow Corporation. The danger from these berries was known to the corporation, but they gave no warning of it to parents. As this was a Scottish case, I take it that it turns upon the question whether the corporation used reasonable care for the child's safety; Lord Sumner said expressly[42]: "We are "not dealing with trespassers or with licensees or with invitees, "as such."

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[32] 50 L.J.C.P. 101.

[33] [1913] 1 K.B. 398, 415.

[34] Ibid. 416.

[35] Ibid. 421.

[36] [1920] 3 K.B. 459; 36 T.L.R. 843.

[37] [1920] 3 K.B. 459, 465.

[38] [1913] 1 K.B. 398.

[39] Ibid. 407.

[40] [1920] 3 K.B. 459, 466.

[41] [1922] 1 A.C. 44; 38 T.L.R. 102.

The corporation relied on the cases of *Hastie*[43] and *Stevenson*.[44] Lord Buckmaster[45] distinguished these cases on the ground that they involved no element of mistake and deception. Lord Atkinson decided the case on the basis that the berries were an allurement. Lord Shaw, while not dissenting from this view, preferred the view that the danger was not an obvious one. He said[46]: "When the danger is familiar and obvious, no special "responsibility attaches to the municipality or owner in respect "of an accident having occurred to children of tender years. The "reason of that appears to me to be this, that the municipality "or owner is entitled to take into account that reasonable parents "will not permit their children to be sent into the midst of "familiar and obvious dangers except under protection or "guardianship. The parent or guardian of the child must act "reasonably; the municipality or guardian of the park must act "reasonably. This duty rests upon both and each; but each is "entitled to assume it of the other."

Lord Sumner dealt with the matter on the basis of the relative duty of care between the corporation and the child when each was exercising a right. But he dealt with the argument that the parent "had not effectually taught the child not to take what "did not belong to it, or that he had not caused it to be in charge "of someone able to take care of it, while in the defenders' park. "In some previous cases these points have been spoken of as "going to the measure of care which the defenders owed to the "child, so that the child would be entitled to no greater care "than an adult:".[47] He referred to the Scottish cases, some of which I have already cited, and to the difficult questions which might arise from the theory of the parents' contributory negligence or of the conditional licence. As to the latter he said[48]: "what if the person provided, though proper, is careless, and

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[42] [1922] 1 A.C. 44, 64, 65.

[43] 1907 S.C. 1102.

[44] 1908 S.C. 1034.

[45] [1922] 1 A.C. 44, 51.

[46] Ibid. 61.

[47] Ibid. 65.

[48] Ibid. 66.

"what if the accident would have happened all the same, whether "such a person was provided or not?" He treated all these as unsettled questions that remained open. At the end of his speech he said[49]: "Where a question as to the care to be used arises "between persons using as of right the place, where they respectively act, infancy as such is no more a status conferring right, "or a root of title imposing obligations on others to respect it, "than infirmity or imbecility; but a measure of care appropriate "to the inability or disability of those who are immature or feeble "in mind or body is due from others, who know of or ought to "anticipate the presence of such persons within the scope and "hazard of their own operations."

In *Liddle* v. *North Riding Yorkshire County Council*[50] the defendants placed a heap of soil by the side of a road which they were repairing and the infant plaintiff, aged seven, climbed to the top and fell backwards and injured himself. It was held that he was a trespasser inasmuch as his right to use the highway did not permit him to climb upon a heap of soil. But in the Court of Appeal some observations were made on the footing that he was a licensee. Scrutton L.J. said[51]: "In my opinion, to make the landowner "liable for injury to a child on his land, it must be proved that "he expressly or impliedly invited children on to his land, and "either did an act which caused damage with knowledge that it "might injure the children, or knowingly permitted the existence "on his land of a hidden danger or trap. The invitation might "be implied from knowledge that children frequented the land "without interference. For obvious dangers, such as unguarded "water, natural or artificial, he will not be liable." Greer L.J.[52] referred to the alternative contention that if the child was a licensee the danger was obvious and not a hidden danger and to the opposing contention that the mound of soil was an allurement. Dealing with these alternative contentions the Lord Justice said[53] that even if the plaintiff was a licensee he still would not be entitled to recover as the danger was open and not concealed. He referred to Lord Dunedin's speech in *R. Addie & Sons (Collieries)* v. *Dumbreck*,[54] and pointed out that his Lordship had used the words "where dangers are obvious they must "run the risk of them" in relation to a claim made on behalf of a boy of four.

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[49] [1922] 1 A.C. 44, 67.

[50] [1934] 2 K.B. 101; 50 T.L.R. 377.

[51] [1934] 2 K.B. 101, 112.

[52] Ibid. 117.

[53] Ibid. 121.

[54] [1929] A.C. 358, 371; 45 T.L.R. 267.

In *Morley* v. *Staffordshire County Council*[55] the defendants were repairing the highway and had roped off a part of it and stacked there a quantity of metal near to a heap of sand. A child of six playing with the sand injured himself on the stack. The Court of Appeal were in doubt about whether the child was a trespasser or not, and dealt with it on the assumption that he was a licensee. MacKinnon L.J. decided the case by applying the passage in the judgment of Scrutton L.J. in *Liddle* v. *Yorkshire County Council*,[56] which I have already cited. He said that the only addition necessary to that statement of the law was in the case of an allurement and there was here no allurement or concealment. It was an obvious danger in so far as it was a danger at all. du Parcq L.J. said that the danger was obvious to a child of six. He added[57]: "In some cases it is right to "say that a child is of such tender years that the invitation or "licence cannot be taken to extend to it unless accompanied by "a grown-up person who does understand danger." But this was not such a case.

In *Williams* v. *Cardiff Corporation*[58] the corporation were the owners of a piece of waste land on which there was a bank with tins and broken glass at the bottom. The infant plaintiff, aged four and a half, rolled down the bank on to the broken glass and tins and injured himself. The county court judge found for the plaintiff and the Court of Appeal upheld his decision. It was conceded that the child was a licensee. It is not quite clear whether the broken glass was visible to the eye or not. If it was not, it would be a concealed danger judged by any standard; the fact that adults do not usually roll down banks and so would be less likely than children to come to harm would not make it any the less a danger. But if the glass was visible, then it would only be a danger to a little child in the sense that though obvious to the eye, it would not be obvious to the apprehension of a child of four. The language used by Jenkins L.J. suggests the latter.

Somervell L.J. quoted the passage of Scrutton L.J. in *Liddle* v. *Yorkshire County Council*,[59] but held that the broken glass and the bank together amounted to a trap; he regarded it as a trap rather than as an allurement. Jenkins L.J. said that broken glass scattered about the ground was from the point of view of an infant a trap or concealed danger, whatever might be said of it from the point of view of an adult. He quoted the passage which

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[55] [1939] 4 All E.R. 92.

[56] [1934] 2 K.B. 101, 112.

[57] [1939] 4 All E.R. 92, 96.

[58] [1950] 1 K.B. 514; 66 T.L.R. (Pt. 1) 243; [1950] 1 All E.R. 250.

[59] [1934] 2 K.B. 101, 112.

I have already cited in the speech of Lord Sumner in *Glasgow Corporation* v. *Taylor*,[60] in which his Lordship said that the measure of care must be appropriate to the ability of those whose presence ought to be anticipated. This required the corporation to keep the ground free from broken glass "the danger to be apprehended "from which would clearly not be apparent to persons of tender "years." Romer J. said that the grassy slope could not amount to a concealed danger for it could be seen, but that coupled with the broken glass and other material at the bottom it did amount to a concealed danger.

Williams v. *Cardiff Corporation* [61] concludes the cases to which I have been referred, and I must now endeavour to extract from them as a whole the true principle. There is, as I have said, especially among the earlier cases, support for Mr. O'Connor's first submission that the test of concealment is the same for little children as it is for adults; or, at any rate, that trenches, like ponds, rivers and heaps, are obvious dangers from which little children need not be specially protected. Apart from the Scottish cases, *Liddle's* case [62] and *Morley's* case [63] are comparatively recent decisions of the Court of Appeal which carry that argument a long way. But I do not think that the solution is to be found simply by drawing up a list of "obvious dangers" which are of the same genus as ponds and contrasting it with a list of "allure-"ments"; and I could adopt the general principle that adults and children are to be treated alike only if I were to disregard the persuasive dicta to the contrary of Lord Atkinson in *Cooke's* case,[64] Lord Sumner in *Glasgow Corporation* v. *Taylor* [65] and Jenkins L.J. in the most recent case, *Williams* v. *Cardiff Corporation*.[66] For myself, I much prefer the flexibility afforded by these dicta and I think that I am free to follow them. A similar flexibility has been adopted in determining what is an "unusual "danger" for invitees: see *London Graving Dock Ld.* v. *Horton*, *per* Lord Normand.[67] To assess the obligations of the licensor simply by reference to the physical powers of the average healthy adult seems to me to be unnecessarily rigid.

Can the licensor be exonerated on the ground that the casualty must in all cases be treated as attributable to what has been called the contributory negligence of the parents? I do not think that this question leads to the right answer. Vaughan Williams L.J. gave it as a ground in *Schofield's* case,[68] but no subsequent English case has adopted it and it is inconsistent with several. The Scottish cases are concerned with a parent's claim in his own right for a solatium for the death of his child, a claim unknown to English law. It is in this light that the references to the contributory negligence of the parent must be interpreted. I know of no English case in which the negligence of the parent has been visited upon the child. It would not, therefore, be correct to talk in England of a parent's contributory negligence; when Lord Sumner used the phrase, he was speaking in a Scottish appeal. Under English law, the parent's negligence would simply be that of another wrongdoer and would not enable the occupier to escape liability if his breach of duty was also a cause of the casualty; under the Law Reform (Contributory Negligence) Act, 1945, a question of apportionment might arise. Anyway, I do not think that it would be a just rule. The parent of a straying child is not ipso facto negligent. A little child may sometimes escape from careful parental control, and it would be wrong to penalize an occupier whose premises were generally safe because he could not prove a parent to be at fault.

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[60] [1922] 1 A.C. 44, 65.

[61] [1950] 1 K.B. 514.

[62] [1934] 2 K.B. 101.

[63] [1939] 4 All E.R. 92.

[64] [1909] A.C. 229, 238.

[65] [1922] 1 A.C. 44, 65.

[66] [1950] 1 K.B. 514.

[67] [1951] A.C. 737, 752; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

The third principle is that of the conditional licence, and the cases show that there is excellent authority for this. Nevertheless, I think that it involves difficulties of the sort which Lord Sumner considered in *Glasgow Corporation* v. *Taylor*[69] and regarded as still unresolved. It is easy to put a condition into an express licence; the licensor can then word it as he likes. It is not so easy to settle the terms of an implied condition. They must, however, be settled with some precision, because upon them will turn the question whether a person using the premises is a trespasser or not. He cannot become a trespasser according as to whether or not he falls into a pit. The law cannot wait to see whether in fact he is circumspect; he must be identifiable as a trespasser so that a legalistic licensor could turn him back at the gate. What is of more practical importance is that in certain cases his status may affect his right to recover. Suppose there is on the premises something which by any standard, adult or otherwise, constitutes a trap, and an unaccompanied little child falls into it. If he is a trespasser, he cannot recover. If he is a licensee he could recover, since in such a case the presence or absence of a guardian would be immaterial.

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[68] 26 T.L.R. 230.

[69] [1922] 1 A.C. 44.

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What, then, is the definition of "tender years"? Is it an age qualification, or does it go by the appearance of physical capability? At the other end of mortality what degree of age or infirmity disqualifies? Should a blind man, who with the friendly help of passers-by walks the streets in comparative safety, be excluded from a public park because he cannot read the warning notices or see the dangers obvious to others? When the degree of incapacity that calls for the condition has been determined, the qualifications of the companion will have to be considered. Must the person who accompanies a child be an adult? If an older child will do, how much older must he be? If a blind man were led by a specially trained dog, would the dog do? If the qualifications of the guardian are settled, what duties does the condition impose upon him? If it is an obligation to exercise reasonable care and his attention at the critical moment is distracted in the performance of some other proper duty, is the child to recover in respect of a danger which an undistracted adult would have perceived?

I think that if this approach to the problem were followed up the conditional licensor would soon become a legal fiction and the terms of the supposed licence would be mainly lawyers' inventions. Legal fictions have played a useful part in the formulation of principles of law, but the formula of the conditional licence has the disadvantage that it does not get at the real need. What is wanted for the reasonable adjustment of the relationship between the licensor and the licensee of diminished capacity is not the formulation of a condition which must operate irrespective of any casualty, but something which places the casualty after it has occurred on one side or the other of the line.

For these reasons I respectfully doubt whether the notion of the conditional licence would, if further developed, be found in the end to work satisfactorily. Furthermore, I think that the general principle which governs the relationship between licensors and licensees can be made to work in the case of little children without the employment of any special device. The general principle is that a licensor must give warning of any danger which would not be perceived by a licensee using reasonable care for his own safety. In many cases the application of the rule raises the question whether the licensee has been guilty of contributory negligence. But that does not mean that, because a little child cannot be guilty of contributory negligence, the rule breaks down. The licensor's duty is not unbounded unless he can prove contributory negligence. There are limits to his duty which exist quite independently of the behaviour of the licensee in any particular case. His duty is to consider with reasonable care whether there are on his premises, so far as he knows their condition, any dangers that would not be obvious to the persons whom he has permitted to use them; and if there are, to give warning of them or to remove them. If he rightly determines a danger to be obvious, he will not be liable because some individual licensee, albeit without negligence in the special circumstances of his case, fails to perceive it. He must be taken to know generally the "habits, capacities and propensities" of those whom he himself has licensed, but not their individual peculiarities. In the light of that general knowledge and on the assumption that they will behave reasonably, he must determine what steps he will take. If he makes that determination carefully, he cannot be made liable, whatever may subsequently happen.

I think that it would be an unjustifiable restriction of the principle if one were to say that although the licensor may in determining the extent of his duty have regard to the fact that it is the habit, and also the duty, of prudent people to look after themselves, he may not in that determination have a similar regard to the fact that it is the habit, and also the duty, of prudent people to look after their little children. If he is entitled, in the absence of evidence to the contrary, to assume that parents will not normally allow their little children to go out unaccompanied, he can decide what he should do and consider what warnings are necessary on that basis. He cannot then be made liable for the exceptional child that strays, nor will he be required to prove that any particular parent has been negligent. It is, I think, preferable that this result should be achieved by allowing the general principle to expand in a natural way rather than by restricting its influence and then having to give it artificial aids in order to make it work at all in the case of little children.

The principle I am seeking to express is that contained in the passage I have quoted from the speech of Lord Shaw in *Glasgow Corporation* v. *Taylor*[70] where he says that the municipality is entitled to take into account that reasonable parents will not permit their children to be sent into danger without protection; that the guardians of the child and of the park must each act reasonably; and that each is entitled to assume of the other that he will. That passage was not spoken in reference to the English law of licence, but nevertheless it seems to me to express perfectly the way in which the English law can reasonably be applied. A licensor who tacitly permits the public to use his land without discriminating between its members must assume that the public may include little children. But as a general rule he will have discharged his duty towards them if the dangers which they may encounter are only those which are obvious to a guardian or of which he has given a warning comprehensible by a guardian. To every general rule there are, of course, exceptions. A licensor cannot divest himself of the obligation of finding out something about the sort of people who are availing themselves of his permission and the sort of use they are making of it. He may have to take into account the social habits of the neighbourhood. No doubt there are places where little children go to play unaccompanied. If the licensor knows or ought to anticipate that, he may have to take steps accordingly. But the responsibility for the safety of little children must rest primarily upon the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at the least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go to. It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land. Different considerations may well apply to public parks or to recognized playing grounds where parents allow their children to go unaccompanied in the reasonable belief that they are safe.

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[70] [1922] 1 A.C. 44, 61.

Although, as I have said, there is good authority for the presumption of a conditional licence, I do not feel compelled to hold that it is the only way out of the dilemma that would otherwise be created. It is not a doctrine which has since its inception been extensively adopted. It is noteworthy that apart from the reference to it by du Parcq L.J.[71] that I have noted, it has not even been mentioned in the Court of Appeal in any of the cases in the last 30 years in which one might have expected it to have been discussed. Although it was put forward by Hamilton L.J. in 1913 [72] as the way out of the dilemma, he plainly in 1922 [73] felt doubts about its efficacy and preferred to state the principle as one involving " a measure of care appropriate to the inability or disability of those who are immature." This is what Lord Atkinson was saying in *Cooke's* case [74] when he said that the duty must be measured by the licensor's knowledge of the habits, capacities and propensities of the licensees. These statements of the law are wide enough to allow as one of the factors determining the appropriate measure the licensor's knowledge of the habits of prudent parents in relation to little children. I think that Lord Sumner and Lord Atkinson are substantially at one with Lord Shaw in his statement of the relevant principle.

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[71] [1939] 4 All E.R. 92, 96.

[72] [1913] 1 K.B. 398, 421.

[73] [1922] 1 A.C. 44, 67.

If this be the true principle to apply, then I have to consider whether the corporation ought in the present case to have anticipated the presence of the infant plaintiff unaccompanied. I say " unaccompanied " because the sister, while doubtless able to take care of herself as is shown by her own avoidance of the trench, was not old enough to take care of her little brother as well. There is no evidence in this case to show that little children frequently went unaccompanied on the open space in a way which ought to have brought home to the corporation that that was the use which was being made of its licence. Apart from evidence of that sort, I do not think that the corporation ought to have anticipated that it was a place in which children of five would be sent out to play by themselves. It is not an overcrowded neighbourhood; it is not as if it were the only green place in the centre of a city. The houses had gardens in which small children could play; if it be material, I believe that at the relevant time the plaintiff's garden was in fact fenced. The parents of children who might be expected to play there all live near and could have made themselves familiar with the space. They must have known that building operations were going on nearby and ought to have realized that that might involve the digging of trenches and holes. Even if it be prudent, which I do not think it is, for a parent to allow two small children out in this way on an October evening, the parents might at least have satisfied themselves that the place to which they allowed these little children to go held no dangers for them. Any parent who looked could have seen the trench and taken steps to prevent his child going there while it was still open. In my judgment, the corporation is entitled to assume that parents would behave in this naturally prudent way, and is not obliged to take it upon itself, in effect, to discharge parental duties. I conclude, therefore, that the infant plaintiff was on the land as a licensee, but that there was no breach of the corporation's duty towards him.

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[74] [1909] A.C. 229, 238.

If I have failed to discover the true principle, then the alternative that I should apply is that of the conditional licence. If the general presumption be that a licence to a little child is conditional upon his being accompanied by an adult, there is nothing in the facts of this case to displace it. The infant plaintiff was not so accompanied and was, therefore, a trespasser, and so the claim would fail on that ground.

If I am wrong in these conclusions, I should assess the damages which ought to be awarded for a nasty accident, which fortunately has had no permanently injurious consequences at all, at £100.

Judgment for defendants.

E. M. W.

Solicitors: *Gregory, Rowcliffe & Co. for Wood, McLellan & Williams, Chatham; Wm. Easton & Sons for Baker & Baker, Rochester.*

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Nov. 18;
Dec. 8.

Denning, Hodson and Romer L.JJ.

JONES *v.* STAVELEY IRON AND CHEMICAL CO. LD.

Negligence—Duty of care—Contributory negligence—Injury caused by fellow workman—Employer's liability—Test of standard of care distinguished from test for contributory negligence—Employer's duty of reasonable care not diminished by delegation.
Common Employment.

A workman suffered personal injuries arising in part from his own error, in part from the mistake of a crane driver who was a fellow employee. At the trial of an action for damages, in which the workman alleged that his employer was liable for the negligence of the crane driver, the judge, applying the test for the standard of care laid down in *Caswell* v. *Powell Duffryn Associated Collieries Ld.* [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722, held that the behaviour of the injured workman did not amount to contributory negligence; and applying the same test to the conduct of the crane driver, held that she was not negligent, and dismissed the action:—

Held, that the crane driver's mistake was not to be judged by the same standard as that of the workman, since whereas negligence was founded on a breach of duty, contributory negligence was not. The employer's duty was a personal duty to take reasonable care

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for the safety of his servants; and the law required a higher standard of care from him, whether acting by superior servants or fellow servants, than it required from an injured workman. Accordingly, judgment should be entered for the plaintiff for damages to be assessed.

Decision of Sellers J. reversed.

Appeal from Sellers J.

The plaintiff, an experienced workman, was a core maker employed by the defendant company, and part of his duty was to move heavy cores from one part of the factory to another. The cores were carried on a pan some 6 feet by 4 feet and 1½ feet deep, resting on a bogey which was man-handled along a railway line. Parallel to this line ran another railway line on which stood wagons on to which the cores were to be lifted with the aid of a crane. On June 4, 1951, the plaintiff was engaged with another man in the process of lifting a load of cores off the pan and into the wagon which stood some 3 feet 9 inches away from the pan. The crane driver, who was a woman, was in the cabin of the crane, above the pan but not directly over the centre of it. From this position she had a good view of the scene immediately below. A large hook was attached to the crane from which hung four chains with hooks on the ends of them. The crane driver brought the hook on the crane as nearly over the centre of the pan as she could. The two men attached the chains to the pan by means of the four hooks but failed to signal to the crane driver, as they ought to have done, that the main hook was out of centre. The crane driver then hauled at the load without first taking the strain to see if all four chains were equally taut. In consequence, the hook of the crane not being in a position exactly over the centre of the pan, the pan swung towards the plaintiff, whose hand was trapped between the wagon and the pan.

In an action for damages for personal injury brought by the plaintiff against the defendants alleging that they were liable for the negligence of the crane driver, Sellers J. held that the behaviour of the injured workman did not amount to contributory negligence according to the test laid down in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[1] He then applied the same test to the conduct of the crane driver and, holding that she was not negligent, dismissed the action. From that decision the plaintiff appealed.

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[1] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

F. W. Beney Q.C. and *D. J. Turner-Samuels* for the plaintiff. There were two errors in the reasoning of the judge: (1) he applied to the actions of the plaintiff and those of the crane driver the same test when considering whether such actions amounted to negligence; (2) he made the test itself too stringent. As to the first, the actions of the crane driver must be regarded, now that common employment has ceased to be a defence, as though they were the actions of the defendants; they carried out their duty of care through the crane driver; the paramount consideration is the safety of the men below. Inattentiveness, or unnecessary haste or forgetfulness, when another's safety is at risk, may well be a breach of this duty of care, even though such matters may not amount to negligence in a man where nothing but his own personal safety is concerned: see *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[1] and *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.*[2]

[DENNING L.J. Might it not also be said that contributory negligence is founded not on a breach of duty but merely on a failure to take reasonable regard for one's own safety?]

That is so, and it was so decided in *Davies* v. *Swan Motor Co. (Swansea) Ld.*[3] It is submitted that an employer cannot apply that test for measuring his duty towards his servant now that he is responsible for a fellow servant's act as though it was his own. The duty of a master to his servant is his own duty, of which he cannot divest himself. It is not vicarious and remains with him notwithstanding that a fellow servant would not be liable for a breach of it: see *Broom* v. *Morgan.*[4] *Stapley* v. *Gypsum Mines Ld.*[5] is another example in which the employer was held liable for the negligent act of a fellow servant where the latter would not himself have been liable. The employer's duty is a high one: see *Horton* v. *London Graving Dock Co.*[6]

[ROMER L.J. Can something be magnified into negligence simply because the master may be liable?]

No; but it is not a question of magnification of one act, it is a comparison of two acts, namely, an act involving a duty of care towards a servant which the contract of service requires, and the act of a servant at his work where nothing but his own safety is concerned.

As to the second point (supra), the language used in the judgment below seems to indicate that where workers are collaborating together at work it is only in exceptional circumstances, and where the actions are excessively bad, that such actions can be described as negligent. This view appears to go beyond any authority in its application either to negligence or to contributory negligence, and, it is submitted, is not sound. None the less, the judge's view that the plaintiff's failure to give a signal to the crane driver, even if it could be said to be causally connected with his injury, did not amount to contributory negligence, is to be supported. What directly caused the injury was the negligence of the crane driver in raising the load without pausing to test the alignment.

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[1] [1940] A.C. 152.

[2] [1934] 2 K.B. 132.

[3] [1949] 2 K.B. 291; 65 T.L.R. 278; [1949] 1 All E.R. 620.

[4] [1953] 1 Q.B. 597.

[5] [1953] A.C. 663; [1953] 2 All E.R. 478.

[6] [1950] 1 K.B. 421; 66 T.L.R (Pt. 1) 246.

R. Marven Everett Q.C. and *A. E. James* for the defendants. The judge in no way misdirected himself. It is well recognized that an error of judgment may be such that it does not amount in law to negligence: see *Latimer* v. *A.E.C. Ld.*,[7] *per* Lord Oaksey. Moreover, it was for the judge to assess the quality of the crane driver's act and the plaintiff's act respectively and to say whether as a question of fact either act amounted to negligence in the circumstances. The judge rightly applied the reasoning in *Caswell's* case[8] to the plaintiff's action, and rightly took the view that the quality of the plaintiff's action was not to be measured by any breach of duty owed to the defendants but solely on the basis that the plaintiff was under a general duty to take reasonable care for his own safety. It is submitted that the judge did not seek to or in fact apply the reasoning in *Caswell's* case[8] to the actions of the crane driver. He was merely illustrating the general proposition that an act of carelessness or inadvertence whether by a plaintiff or by a person in the crane driver's position did not necessarily amount to negligence in law. Negligence is a question of fact, not of law, and the judge has so decided this case. As to what may amount to negligence and for the factors to be considered, see *Glasgow Corporation* v. *Muir.*[9]

The point of law sought to be made on behalf of the plaintiff is not well founded. An employer's liability at common law may arise in two ways, first, on the basis qui facit per alium facit per se. That was the way in which the employer's liability arose in *Wilsons and Clyde Coal Co.* v. *English*,[10] and is inapplicable in the present case. The other way in which an employer's liability may arise is by virtue of respondeat superior. This liability was one which formerly was the subject of the defence of common employment, see *Wilsons'* case,[11] and since the defence of common employment has been abolished by the Law Reform (Personal Injuries) Act, 1948, the employer has become liable for casual acts of negligence of the managers, foremen or fellow employees which would have been the subject of the defence of common employment prior to that Act. The crane driver's conduct in the present case should be judged accordingly. It is therefore unreal to say that the crane driver's standard of driving of the crane should be regarded as though it was the standard of the employer personally. The latter view would lead to very strange results.

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[7] [1953] A.C. 643; [1953] 2 All E.R. 449.

[8] [1940] A.C. 152.

[9] [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44.

[10] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

The crane driver's action should be regarded as a casual act of inadvertence not amounting to negligence and the judge was correct in so holding, and no different standard is to be applied to the action of the crane driver because she happened to be in the course of her employment than if she had been driving the crane as an individual. The decision of the trial judge was right.

A. E. James followed.

Beney Q.C. replied.

Cur. adv. vult.

DENNING L.J. stated the facts and continued: On the judge's findings there were two mistakes which led up to this accident: the first mistake was that, at the time when the chains were hooked on, the hook of the crane was not truly centred over the load. That was more a matter for the men below than for the crane driver. The practice, as proved in evidence, is that the crane driver brings the hook into a tentative position as near centre as she can, but she cannot see as well as the men below, so if it is out of centre, they signal to her to bring it into centre. The manager of the foundry said that "the "person on the floor is the only person who can give proper "adjustment." In this case the injured man did not give the proper adjustment. That was his mistake.

The second mistake was that, when the crane driver started to hoist the load, she did not pause in the usual way to take the weight and tighten the chains. She hoisted the load from the trolley straight up without a pause. A consulting engineer spoke as to the usual procedure. He said: "The common practice is "just to take the slack out of the chain first and see that every- "thing is balanced before continuing the hoist." In this case, if the crane driver had paused, either she or the men below would have seen that it was not truly centred and would have corrected it. As she did not pause, however, no one had an opportunity to correct the faulty centring, and the load swung out more than usual. In this case the crane driver did not pause to take the weight. That was her mistake.

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[11] [1938] A.C. 57.

The problem in this case is to assess the quality of those two mistakes. The trial judge put them on the same level and said that neither of them amounted to negligence. The question is whether he is right.

So far as the injured man's mistake is concerned, I agree with the judge that it did not amount to contributory negligence. Ever since *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[1] the courts have made allowances in favour of an injured workman. Even if he has been thoughtless or inadvertent or has made an error of judgment, he is often not made to bear any share of the responsibility. The reason is, no doubt, historical. Until 1945 a workman, who proved that his employer was guilty of a serious fault, was nevertheless liable to be defeated altogether if he was in any degree at fault himself. It was not open to the court at that time to apportion the responsibility. The workman failed altogether. In order to overcome this injustice, the House of Lords in *Caswell's* case [2] relaxed the standard of care required of workmen in a factory. The thoughtlessness or inadvertence of a workman was not necessarily to be regarded as contributory negligence such as to defeat his claim. He was often allowed to be thoughtless or inadvertent without it telling against him. Since 1945 this standard has repeatedly been applied to injured workmen just as it was before. Applying it in this case, I think that the plaintiff was, at most, guilty of an error of judgment which was in the circumstances an excusable error. He thought that the hook was truly centred whereas it was not. I do not think that he should be found guilty of contributory negligence.

But what about the mistake made by the crane driver? The trial judge seems to have thought that "what is sauce for the "goose is sauce for the gander"—that the same standard of care should be applied to the crane driver as to the injured man,

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[1] [1940] A.C. 152, 176–8; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[2] [1940] A.C. 152.

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and that she should be excused for thoughtlessness or inadvertence the same as he.

This raises a very nice problem. Before the Law Reform (Personal Injuries) Act, 1948, the employer would have been protected by the doctrine of common employment, but since 1948 he is not so protected. The doctrine has been abolished. But if the law were now to begin to make allowances for the mistakes of fellow-workmen (such as the crane driver here) on the same lines as it excuses the injured workman, we should soon have the doctrine of common employment back again in a new dress. That cannot be right.

So far as the crane driver's mistake is concerned, I do not think that it is to be judged by the same standard as that of the injured man. The difference lies in this: negligence is founded on a breach of duty, whereas contributory negligence is not. The employer is made liable, not so much for the crane driver's fault, but rather for his own fault committed through her. He puts her in charge of a great machine which can cause much damage if it is not properly handled. He must see that reasonable care is used in the handling of it so that it does not cause damage. No matter whom he employs to handle it, he must ensure that a proper standard of care is obtained. He acts by his servant; and his servant's acts are, for this purpose, to be considered as his acts. Qui facit per alium facit per se. He cannot escape by the plea that his servant was thoughtless or inadvertent or made an error of judgment. If he takes the benefit of a machine like this, he must accept the burden of seeing that it is properly handled. It is for this reason that the employer's responsibility for injury may be ranked greater than that of the servant who actually made the mistake: see *Jones* v. *Manchester Corporation*,[3] and he remains responsible even though the servant may, for some reason, be immune: see *Broom* v. *Morgan*.[4] A good illustration, as Mr. Beney pointed out, is *Stapley* v. *Gypsum Mines Ld.*,[5] where the widow of the dead man, Stapley, succeeded against his employer, though she would, no doubt, have failed against his fellow-workman Dale because of their joint agreement.

My conclusion is, therefore, that the law expects a higher standard of care from employers than it does from injured workmen; and this is so, no matter whether the employers are acting by superior servants or by fellow-servants. This state of the law should not, however, be carried to extremes in either direction. The standard expected of employers should not be put so high as to make them insurers: and the standard expected of an injured workman should not be put so low as to exempt him from responsibility for his own carelessness. Each should bear his proper share of responsibility.

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[3] [1952] 2 Q.B. 852; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

[4] [1953] 1 Q.B. 597; [1953] 1 All E.R. 849.

[5] [1953] A.C. 663; [1953] 2 All E.R. 478.

Approaching the present case in this way, it seems to me that the crane was not handled with reasonable care and that the employers are answerable for it. Mr. Marven Everett admitted as much, but argued that no damage could have been anticipated to flow from the mistake. I do not agree. I should have thought that a reasonable person could foresee that, if the crane driver did not take the strain and get the load properly balanced before hoisting it, some damage might be done to somebody. The employers are therefore responsible, but the injured man is not, because his mistake did not amount to contributory negligence.

In my opinion this appeal should be allowed and judgment entered for the plaintiff for damages to be assessed.

HODSON L.J. If the normal practice of lifting a load by crane in a sling had been followed the accident would not have happened. It is clear that to haul away without applying the normal precaution of taking the strain first may lead to an accident. The evidence of the defendants' manager was quite specific on this point. In cross-examination he said: "The usual practice "is to take the weight and tighten the chains." When asked: "The usual procedure is to take the weight, tighten the chains "and then wait for a signal?" he answered: "Yes, unless the "crane driver sees that the load is safe and central." Later he said: "I think if the crane driver was over the job and tightened "the chains and took the weight it would be all right; she would "proceed to do her job." A consulting engineer, called on behalf of the plaintiff, gave evidence to the same effect and pointed out that a crane driver can see at once, when tightening the chains, whether one sags or not, and can thus tell whether the lift is central. It is true that the centring of the sling, in the first place, is a combined operation, but this is only approximate, and the final responsibility for centring the sling accurately is with the crane driver who hauls away the load.

Sellers J. was not impressed by the plaintiff's evidence and thought that he was unwilling to accept his responsibility, as the man on the ground, to get the drop of the sling on the proper alignment. However, he did not find him guilty of negligence, applying to him the doctrine first enunciated by Lawrence J. in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.*,[6] and later approved by the House of Lords in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[7] Lawrence J. had said[8]: ". . . in "considering whether an ordinary prudent workman would have "taken more care than the injured man, the tribunal of fact "has to take into account all the circumstances of work in a "factory and that it is not for every risky thing which a workman "in a factory may do in his familiarity with the machinery that "a plaintiff ought to be held guilty of contributory negligence." Sellers J. found that there had been an error of judgment on the part of the plaintiff not amounting to negligence. I agree with this finding, but, in addition, he did say that the plaintiff was more at fault than anyone else. With all respect to Sellers J., I cannot agree with that conclusion. The plaintiff could not get exact alignment from his position at the side of the bogey and had to rely, ultimately, on the crane driver taking the strain to check the alignment before hauling away. Since the wagon was close to the pan, a slight lateral error would be enough to cause a dangerous swing which the plaintiff could do nothing to correct. In my opinion, fault must be attributed to the crane driver, and the question then arises whether this amounts to negligence. Sellers J. found that the crane driver was at fault in acting as she did, but treated her fault as an error of judgment not amounting to negligence on the part of a workman within the doctrine enunciated above. I am of opinion that this fault ought not to be so regarded. A departure from the normal safe practice of taking the strain when raising heavy loads by crane in a sling is obviously dangerous when anyone is near the load. In my view, in the circumstances of this case, the failure of the crane driver to take the precaution was an act of negligence which caused the injury to the plaintiff, and for this the employer is as liable as if he himself had been sitting in the crane cabin and working the crane. I cannot agree that the act or omission of the employers' servant ought, as the trial judge thought, to be looked at exactly in the same way as the act or omission of the plaintiff.

The doctrine approved in *Caswell's* case[9] applies to workmen who are injured in the course of their employment and who might otherwise be debarred from recovering in whole, or part, by reason of their contributory negligence. Lawrence J. was speaking only of contributory negligence.

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[6] [1934] 2 K.B. 132.

[7] [1940] A.C. 152.

[8] [1934] 2 K.B. 132, 139–40.

[9] [1940] A.C. 152.

In *Caswell's* case Lord Wright used this language [10]: "What "is all-important is to adapt the standard of what is negligence to "the facts, and to give due regard to the actual conditions under "which men work in a factory or mine, to the long hours and the "fatigue, to the slackening of attention which naturally comes "from constant repetition of the same operation, to the noise and "confusion in which the man works, to his preoccupation in what "he is actually doing *at the cost perhaps of some inattention to* "*his own safety.*"

I emphasize the last eleven words of the sentence I have read. If one applies the doctrine to employers and their servants through whose hands they act, one must end the sentence by substituting the words "at the cost of some inattention to the safety of "employees." This, to my mind, would be inconsistent with the law as laid down in *Smith* v. *Baker & Sons*,[11] and in *Wilsons and Clyde Coal Co.* v. *English*,[12] which sets out in clear terms the duty of an employer to take reasonable care for his servant's safety. This duty is personal to him, a failure to perform which constitutes personal negligence even though he acts through the hands of another.

The position of an injured plaintiff who is accused of contributory negligence is different, in that he is not similarly in breach of a duty to his employer when, as Lord Wright said,[13] he is preoccupied in what he is doing at the cost of his own safety. I do not intend to be taken as saying that every error made by every employer by himself, or through his servants, which causes injury must necessarily be negligent. This is a question of fact to be decided in each case.

I cannot, however, accept that the doctrine which I have been discussing can be extended beyond the field of contributory negligence and applied to the servants of the employer when they stand in the master's shoes in the same way as when they are injured in performing work in his service.

I agree, therefore, that the appeal should be allowed and judgment entered for the plaintiff for damages to be assessed.

[10] [1940] A.C. 152, 178.

[11] [1891] A.C. 325; 7 T.L.R. 679.

[12] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[13] [1940] A.C. 152, 178.

Romer L.J. (Read by Denning L.J.) In my opinion two things emerge quite plainly from the evidence which was given in this case. The first is that the crane driver was in dereliction of her duty in hoisting the crane straight up without pausing to tighten the chains of the pan, and the second is that this omission on her part resulted in injury to the plaintiff. There is no dispute as to the latter of these points and not much, I think, as to the former. Apart from the plaintiff himself, three witnesses, namely, Mr. Binns. Mr. Goode and Mr. Howard (who is the manager of the defendants' foundry) all testified that it is the common practice for a crane driver to take the strain of a pan, so as to ensure that the crab is central, before hoisting the pan off the ground. "The usual procedure," said Mr. Howard, "is to take the "weight and tighten the chains," and the crane driver, in her own evidence, admitted that this was so.

Inasmuch as the crane driver, on the occasion of the accident, forgot about this customary precaution and therefore failed to take it, with the consequence that injury was caused to the plaintiff, it would seem prima facie that she was guilty of an act of negligence for which her employers are answerable in law. I rather gather, from one passage in his judgment, that Sellers J. was in fact inclined to impute negligence to the crane driver but exonerated her on the footing, as I understand it, that her omission would have been held to amount to no more than an error of judgment according to the reasoning which the courts have applied since *Caswell's* case [14] in determining issues of contributory negligence. The question here, however, is not as to the crane driver's rights but as to her employers' liability. As to this, it is well settled that a master is liable for the acts of his servants, if done in the course of their employment, on the principle qui facit per alium facit per se. If an employer employs a crane driver to operate a crane, it is the employer himself who, in the eye of the law, is operating it, though he is doing so through the person of the employee. From this it follows that, if the crane driver's wrongful handling of the crane results in injury to a third party, it is no defence to the employer to say that the workman's act or omission would have amounted to something less than contributory negligence if it had resulted in injury to the workman himself. It is the standard of care which the crane driver (as the defendants' servant) owed to the plaintiff which is material to the present case, not the standard of care which she owed to herself; and I am of opinion that her conduct fell short of that standard to a degree which amounted to negligence, and inasmuch as, in my opinion, a resulting injury to the plaintiff was reasonably foreseeable the defendants are, in my judgment, liable.

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[14] [1940] A.C. 152.

The next question is whether the plaintiff himself was guilty of contributory negligence. It has been recognized since *Caswell's* case [15] that a workman's default which, in relation to some third party, would constitute negligence, may amount to no more than an excusable error of judgment in relation to himself. As a matter of logic this is not, perhaps, altogether easy to appreciate; and many people might think that a workman, who has a wife and three or four young children dependent upon him, is under at least as much obligation to look after his own safety as he is to ensure that of other people. Moreover, the distinction between the two standards of care has lost much of its justification since the statutory removal of a workman's former disqualification to sue in respect of an injury which had been caused, in part, by his own negligence. However, in applying to the present case the reasoning of *Caswell's* case,[15] I am of opinion that the plaintiff has not been proved guilty of contributory negligence; for the evidence does not, in my judgment, ". . . show that he was "guilty of more than an error of judgment or heedlessness or "inadvertence in regard to his own safety not amounting to "contributory negligence or misconduct . . .": see *per* Lord Wright in *Caswell's* case.[16] It is true that the general practice appears to be that the men on the ground are expected to ensure that the hook is centralized, and to give any necessary signals to the crane driver, and that the plaintiff did not do this on the occasion in question. He swore, however, that he did not know that the crane was not central, and Mr. Groves, who was co-operating on the other side of the pan, said that he did not know it either; and they were both agreed that they were prevented from seeing each other by reason of the height of the load. In these circumstances it is not easy to see what the plaintiff ought to have done. He might, I suppose, have summoned some other person to check that the crab was central and then have signalled to the driver, but I cannot think that his failure to do this amounted to more than a venial error of judgment, especially as he had no reason to suppose that, if the crane driver started to lift before receiving a signal, she would depart from the ordinary practice of merely taking the strain. Moreover, as the crane driver started to lift without receiving a signal either to bring the hook into centre or to hoist the load, it may well be that the plaintiff's omission to give a signal was not an effective cause of the accident. In all the circumstances it does not appear to me that contributory negligence has been established against the plaintiff.

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[15] [1940] A.C. 152.

[16] Ibid. 174.

I accordingly agree with the proposed order.

Appeal allowed.

Solicitors: *W. H. Thompson; Bell, Brodrick & Gray, for Harold Jackson & Co., Sheffield.*

E. J.

1955
March 2.

Lord Goddard C.J., Ormerod and Gorman JJ.

STOPHER *v.* NATIONAL ASSISTANCE BOARD.

NATIONAL ASSISTANCE BOARD *v.* PARKES.

Husband and Wife—Maintenance—Agreement—Agreement to separate—Agreement by wife not to claim financial provision from husband—No matrimonial offence by wife—Wife in receipt of assistance under the National Assistance Act, 1948—*Liability of husband to maintain wife—National Assistance Board entitled to recover from husband in respect of sums paid to wife—National Assistance Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42 (1), 43.
National Assistance.

At common law and under section 42 of the National Assistance Act, 1948, a husband is bound to maintain his wife so long as the marriage tie subsists unless the wife has committed adultery or is in a state of desertion, and, therefore, where a wife has not committed such a matrimonial offence, the National Assistance Board are entitled under section 43 to recover contributions from her husband in respect of assistance given under Part II of the Act to the wife, even though there has been a consensual separation which would provide the husband with a good defence to a claim by the wife for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949.

Where, therefore, a husband and wife parted, in one case by an agreement containing no express or implied provision that the husband should maintain the wife, and in another case under a separation agreement whereby the wife covenanted that she would not at any future time be or claim to be entitled to any financial provision whatsoever from the husband, and in each case the wife became destitute and received assistance from the National Assistance Board, neither wife being guilty of any matrimonial offence:—

Held, that the National Assistance Board were in each case entitled under section 43 of the National Assistance Act, 1948, to recover from the husband contributions in respect of any reasonable payments made to the wife.

National Assistance Board v. *Wilkinson* [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255 distinguished.

National Assistance Board v. *Prisk* [1954] 1 W.L.R. 443; [1954] 1 All E.R. 400 applied.

STOPHER *v.* NATIONAL ASSISTANCE BOARD.

CASE STATED by Ipswich justices.

On July 15, 1954, a complaint was preferred by the National Assistance Board against the defendant, William Herbert Stopher, that he was the husband of Martha May Stopher whom he was liable to maintain pursuant to section 42 of the National Assistance Act, 1948,[1] and by reference to whose requirements assistance under Part II of the Act was given on June 21, 1954, and on other days and was continuing to be given at the weekly rate of 11s. 6d.

The following facts were found by the justices: Martha May Stopher, the wife, and the defendant were married on December 10, 1918. In 1946 the wife and the defendant agreed to separate and had thereafter lived apart, and the agreement contained no express provision that the defendant should maintain the wife, and no such provision was to be inferred or implied. On July 25, 1951, the justices dismissed an application by the wife for an order for maintenance on the grounds of the defendant's desertion and wilful neglect to maintain her on the finding by the justices of the above facts.

On June 1, 1954, at the instance of the National Assistance Board the wife wrote to the defendant the following letter: "Dear "Will, I am writing to know if you are willing to support me,

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[1] National Assistance Act, 1948, s. 42: "(1) For the purposes of this "Act—(*a*) a man shall be liable to "maintain his wife and his children, "and (*b*) a woman shall be liable "to maintain her husband and her "children."

S. 43: "(1) Where assistance is "given or applied for by reference to "the requirements of any person . . . "the Board . . . may make a com"plaint to the court against any other "person who for the purposes of this "Act is liable to maintain the person "assisted. (2) On a complaint under "this section the court shall have "regard to all the circumstances and "in particular to the resources of the "defendant, and may order the defen"dant to pay such sum, weekly or "otherwise, as the court may consider "appropriate."

"or make a home for me. I shall give you 14 days to consider "it, and let me know your decision. Your wife, May." That letter was not a genuine offer to resume cohabitation, nor was there on the part of the wife a bona fide willingness to resume cohabitation with the defendant.

Before, on and after June 21, 1954, the wife was given assistance under Part II of the Act and such assistance was continuing at the weekly rate of 11s. 6d. The wife had not been guilty of cruelty or of any other matrimonial offence. The resources of the defendant were a retirement pension of £1 12s. 6d. a week and capital assets arising out of compensation, amounting to £2,400, received for injury in a road accident.

It was contended by the defendant that he was not liable at common law to maintain the wife, and that liability under section 43 of the Act was consequently negatived.

It was contended by the Board that for the purposes of the Act the defendant's liability to maintain the wife could only be discharged or suspended by her adultery or desertion, neither of which was alleged or proved.

The justices were of opinion that as the wife had committed no matrimonial offence the defendant was for the purposes of the Act liable to maintain her, and that even if his liability had ceased by reason of the consensual separation, the wife's letter to him, inasmuch as it was in effect a request for maintenance, was sufficient to revive his liability, and accordingly they ordered the defendant to pay 10s. per week to the Board.

The defendant appealed.

Harold Cassel for the defendant. The fact that a husband's obligation under the general law to maintain his wife has ceased is a good defence to a claim for contribution by the National Assistance Board. *National Assistance Board* v. *Wilkinson* [2] established that the same defences are open to a husband under the National Assistance Act, 1948, as were open to him before the passing of the Act. The husband in the present case is not legally responsible for his wife's contracts nor bound to receive her into his home and is not, therefore, legally bound to maintain her. In *National Assistance Board* v. *Prisk* [3] there was a consensual parting and an express agreement that the husband should maintain the wife, but where there is a consensual separation and no such agreement the wife is not entitled to maintenance: see the remarks of Lord Merriman P. in *Baker* v. *Baker*,[4] and see also *Stringer* v. *Stringer*,[5] which appeared to turn on the onus of proof. On the facts found by the justices, therefore, the husband's obligation to maintain the wife has ceased and accordingly he has a defence to the Board's claim.

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[2] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255.

[3] [1954] 1 W.L.R. 443; [1954] 1 All E.R. 400.

Rodger Winn for the Board. On the authority of *National Assistance Board* v. *Wilkinson*[6] and *National Assistance Board* v. *Prisk*[7] the Act of 1948 imposes on the husband an obligation to maintain his wife unless the common law frees him from it. The common law position depends upon whether the wife is capable of supporting herself, or is being supported by someone else; if she is not, then there is an inference that she has authority to pledge her husband's credit: see *Johnston* v. *Sumner*.[8]

[LORD GODDARD C.J. What if there is a written agreement that a husband is no longer to be liable to support his wife?]

In such a case it is conceded that the wife would have no right to pledge her husband's credit, but that does not affect the position of the Board. In *Aldritt* v. *Aldritt*,[9] based on *Jones* v. *Guardians of Newtown and Llanidloes*,[10] the court held that the board of guardians were not assignees of the wife's right, but had separate and distinct rights of their own: see also *Llewellyn* v. *Turner*.[11]

At common law a wife had no right to sue her husband in contract; all that she had power to do was to pledge his credit. The Summary Jurisdiction (Separation and Maintenance) Acts gave her a special statutory right to obtain an order from justices where she could show that the husband had promised to maintain her, or had the means to do so, but it is wrong to say that if there is no right in the wife to obtain an order under those Acts, then the Board has no right against the husband. *Baker* v. *Baker*[12] and *Stringer* v. *Stringer*[13] turn upon the meaning of the words "wilful default" to maintain in the relevant statute. In *Chapman* v. *Chapman*[14] it was the wife's position under the Summary Jurisdiction (Separation and Maintenance) Acts that was being considered: see the judgment of Asquith L.J. referring to "two

[4] (1949) 66 T.L.R. (Pt. 1) 81, 82.

[5] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 873.

[6] [1952] 2 Q.B. 648.

[7] [1954] 1 W.L.R. 443.

[8] (1858) 3 H. & N. 261.

[9] Unreported; January 12, 1951.

[10] [1920] 3 K.B. 381; 36 T.L.R. 758.

[11] (1922) 126 L.T. 532.

[12] 66 T.L.R. (Pt. 1) 81.

[13] [1952] P. 171.

[14] Unreported; April 4, 1951.

"such summonses," quoted by Lord Merriman P. in *Stringer* v. *Stringer*.[15] The enforcement of the obligation created by those statutes to which that line of cases relates throws no light on the husband's obligation at common law and the cases do not, therefore, affect the position under the National Assistance Act, 1948. In cases under those Acts the position might be affected by an agreement, for if there is an agreement there might be no "wilful "default." In *Tulip* v. *Tulip*[16] an agreement was held not to bind the court, and see also *Hyman* v. *Hyman*,[17] where the question was whether an agreement was binding after divorce. [Reference was also made to *Pardy* v. *Pardy*.[18]] In *National Assistance Board* v. *Wilkinson*[19] the court had no occasion to consider any position other than one where the wife was in a state of desertion; in so far as any of the judgments went any further than that, they were obiter. [Reference was also made to *Johnston* v. *Sumner*.[20]]

Harold Cassel in reply. Unjust and arbitrary consequences would arise if the Board were entitled to recover from the husband in a case such as this: see the final remarks of Devlin J. in *National Assistance Board* v. *Wilkinson*.[21] The foundation of the decision in *National Assistance Board* v. *Prisk*[22] was that the husband was in fact liable under the agreement to maintain the wife; his liability was not considered because it was established ex hypothesi by the agreement. *Baker* v. *Baker*[23] and *Stringer* v. *Stringer*[24] reflect the common law position and cannot be distinguished, for the Summary Jurisdiction (Separation and Maintenance) Acts do not give a right to maintenance, but only a right to obtain an order. If the only defences open to a husband under the National Assistance Act, 1948, are adultery and desertion by the wife, that means implying in the Act the word "excepting," and all the related law in respect of connivance and condonation.

NATIONAL ASSISTANCE BOARD v. PARKES.

CASE STATED by Flintshire justices sitting at Rhyl.

On July 3, 1954, a complaint was preferred by the National Assistance Board against the defendant, Roderick Bruce Parkes, alleging that he was the husband of Victoria Brenda Parkes, whom he was liable to maintain pursuant to section 42 of the National Assistance Act, 1948, and by reference to whose requirements assistance under Part II of the Act was given on May 31, 1954, and other days, and was continuing to be given at the weekly rate of 39s. 6d.; and the Board applied for a summons to be served upon the defendant to show cause why an order should not be made upon him under section 43 of the Act to pay such sum, weekly or otherwise, as the court might consider appropriate.

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[15] [1952] P. 171, 179.

[16] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

[17] [1929] A.C. 601; 45 T.L.R. 444.

[18] [1939] P. 288; 55 T.L.R. 1037; [1939] 3 All E.R. 779.

[19] [1952] 2 Q.B. 648.

[20] 3 H. & N. 261.

[21] [1952] 2 Q.B. 648, 661.

[22] [1954] 1 W.L.R. 443.

[23] 66 T.L.R. (Pt. 1) 81.

[24] [1952] P. 171.

The following facts were found by the justices: The defendant and Victoria Brenda Parkes, the wife, were lawfully married on March 21, 1950. On August 9, 1952, the defendant and the wife entered into a separation agreement whereby they agreed to live apart and the wife covenanted (i) that she would not at any future time be or claim to be entitled to any financial provision whatsoever from the defendant in respect of herself and a child of the marriage or either of them, and that she would not at any future time pledge the credit of the defendant and would at all future times keep the defendant and his estate and effects fully and effectually indemnified against all debts and liabilities thereafter contracted or incurred by her and against all actions, proceedings, claims, demands, costs, damages, losses and expenses in respect and on account thereof; and (ii) that neither she nor any person on her behalf would at any future time directly or indirectly molest, annoy, disturb, or interfere with the defendant nor at any time require or by any means either by taking judicial proceedings or otherwise endeavour to compel the resumption of cohabitation between them or to enforce any restitution of conjugal rights or to compel the defendant thereafter to make to her any financial provision for herself and for the child or either of them.

The wife was in need of assistance and had received it to the extent and in the manner alleged in the complaint. On July 1, 1954, the defendant was summoned to appear before the justices to answer a complaint by the wife made on the advice of officers of the Board under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, that he had wilfully neglected to maintain her, but the complaint was withdrawn on the defendant consenting to an order being made under the Guardianship of Infants Acts, 1886 and 1925, for payment of 30s. per week for the maintenance of the child of the marriage until the child should attain the age of 16 years, and also agreeing to pay voluntarily an additional 10s. per week for such maintenance. The wife was not willing to resume cohabitation with the defendant. The defendant was in receipt of a gross wage of £900 a year comprised of £500 basic salary and £400 East African and local cost of living allowance.

It was contended on behalf of the Board that for the purposes of the National Assistance Act, 1948, a husband was liable to maintain his wife unless she had committed a matrimonial offence and that the wife had committed no matrimonial offence; that even though the wife had failed to obtain an order for maintenance the Board were entitled to an order against the defendant under section 43 of the Act; and that the existence of the separation agreement containing the covenants by the wife was no bar to the Board obtaining an order under section 43.

It was contended on behalf of the defendant that the liability under section 43 was subject to the common law defences open to a husband, and that the existence of the separation agreement in which the wife agreed not to claim or to be entitled to any financial provision from him was a bar to the obtaining by the Board of an order under section 43.

The justices were of the opinion that the defendant's liability to maintain his wife ceased on the making of the separation agreement; that the agreement was a bar to the wife obtaining an order in proceedings at her suit and that the Board were necessarily under a similar disability upon the basis that their rights under section 43 were subject to defeasance by any defences available to the defendant in proceedings for maintenance by the wife, and that, accordingly, the defendant could not be liable to the Board under the National Assistance Act, 1948, for any sum in respect of the maintenance of the wife. They therefore dismissed the complaint.

The Board appealed.

Rodger Winn for the Board.
R. I. Threlfall for the husband.

Rodger Winn for the Board. This case is governed by Stopher's case. It is manifestly contrary to public policy as enacted in the National Assistance Act, 1948, that a husband and wife should agree that in the event of the wife being in receipt of national assistance the husband shall not be liable. [Reference was made to *Tulip* v. *Tulip* [25] and *Hyman* v. *Hyman*.[26]]

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[25] [1951] P. 378.

[26] [1929] A.C. 601.

R. I. Threlfall for the defendant. *National Assistance Board* v. *Prisk*[27] is distinguishable. In that case there was a term in the separation agreement that the husband should pay some sum to the wife; he thereby expressly accepted the liability to maintain her. The question must always be, "Did they part on terms "which obliged the husband to maintain the wife?" In *National Assistance Board* v. *Prisk*[27] the wife could have succeeded in a complaint of wilful failure to maintain her on the principle in *Tulip* v. *Tulip*,[28] but in this case the wife herself could not have succeeded against the husband. Once a husband has accepted an express or implied liability to maintain the wife after a consensual separation, the quantum in the deed or agreement does not bind the wife or the Board, but if the wife has no right at all the Board cannot recover. The Board cannot recover from the husband where the wife has been guilty of adultery or desertion, not because the wife has committed a matrimonial offence, but because the husband's liability has ceased. The question is not why it has ceased, but whether or not it has ceased.

LORD GODDARD C.J. These two cases raise substantially the same considerations.

In the first case the justices found as facts that in 1946 the parties had separated after several years of married life, and had thereafter lived apart, and "that the said agreement contained "no express provision that the defendant should maintain the "wife, and that no such provision was to be inferred or implied." The wife applied for maintenance on the ground of the defendant's desertion and wilful neglect to maintain her, but that application was dismissed by the justices and she was given national assistance. Meanwhile, at the instance of the National Assistance Board who, I rather hope, will not take this course in future—it is a course to be deprecated—the wife wrote to the defendant a letter in which she said: "I am writing to know if "you are willing to support me, or make a home for me. I shall "give you 14 days to consider it, and let me know your decision."

The justices have found that that was not a genuine offer by the wife, and that she had no intention of carrying it out; and I say at once that I do not think that the National Assistance Board ought to encourage a wife to write such a letter. It does not add to the position unless the wife genuinely wants to return to her husband, and then questions would arise as to his obligation.

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[27] [1954] 1 W.L.R. 443.

[28] [1951] P. 378.

I need not go into that except to say that on the findings of the justices the parties were in exactly the same position as they were before the wife wrote that letter.

The justices found that as the wife had committed no matrimonial offence, the defendant was for the purposes of the Act liable to maintain her, and that even if his liability had ceased by reason of the consensual separation, the wife's letter to him, inasmuch as it was in effect a request for maintenance, was sufficient to revive his liability. Mr. Winn, of course, does not rely on that second finding, but he does rely on the first.

[His Lordship read sections 42 (1) and 43 of the National Assistance Act, 1948, and continued:] I pause to say that the justices have given a great deal of attention to the present case and have come to a perfectly right decision in the end and have only ordered a contribution of 10s. a week. The importance of this case—and it is in some respects important—is that the arguments we have heard in the two cases show that there may be considerable misunderstanding about the true effect of the decision of this court in *National Assistance Board* v. *Wilkinson* [1] and also of certain other cases which have been decided in the Probate, Divorce and Admiralty Division of the High Court.

Let me endeavour briefly to explain what I believe the law to be on the subject apart from section 42. There is no doubt that at common law a man is obliged to support his wife, subject to this: that if his wife commits adultery his obligation ceases entirely. A man is not required to maintain an adulterous wife, and in *National Assistance Board* v. *Wilkinson* [1] I cited [2] the dictum of Littledale J. in *Rex* v. *Flintan*,[3] where he said of an adulterous wife, "having rendered herself unworthy of her "husband's protection, she returns to the same state as if she "were not married." Nor is he obliged to maintain a wife who has deserted him, but his obligation, as was shown in *Jones* v. *Guardians of Newtown and Llanidloes*,[4] is only suspended so long as the wife remains in a state of desertion but is renewed on her return.

The Poor Law Amendment Act, 1868, was the first Act which gave the Poor Law Boards of Guardians the right to recover money which they had paid to a wife. I think I am right in saying that before that Act the only way in which a man could be forced to support his wife and family was by prosecuting him under the Vagrancy Act, 1824. The Poor Law Amendment Act, 1868, enlarging the powers given by the earlier Poor Law Amendment Act, 1850, which related only to a lunatic wife, enabled the guardians to recover the cost of maintenance given to a woman living apart from her husband. Of course, if the woman had committed adultery, there again the husband would have had an answer, for he could have said: "I am not bound "to support the woman; I am entitled to regard her as not my "wife and, therefore, I am not liable to repay the amount of "money you have expended upon her." But when this case was first opened, it occurred to me at once—and I think that in this case it was a first impression that was right—that whenever a wife, apart from adultery and desertion, became chargeable to the poor law, as it used to be called, the obligation of the husband, at any rate since 1868, has never been in dispute. It is very much the same as in the case of a child; as I pointed out in *National Assistance Board* v. *Wilkinson*,[5] at common law and apart from criminal responsibility, a father is not responsible for the maintenance of his children. It is a curious state of the law, but it is none the less true that at common law a father was not bound to supply his children with food or clothing, although he could be prosecuted, very likely, if he did not. The civil liability did not exist, but as soon as the children became chargeable to the Board of Guardians, then under the poor law a father had to pay. All that the court decided in *National Assistance Board* v. *Wilkinson*[5] was that since before the Act of 1948 a husband would have had an answer to the guardians if he had been asked to repay relief given to an adulterous wife or to a wife who was in a state of desertion, the Act of 1948 had not imposed any higher liability upon him; it had not altered the law in that respect, and, therefore, if the National Assistance Board assisted a wife who had been guilty of a matrimonial offence, the husband could escape liability. But that all depends upon the fact that the wife committed a matrimonial offence, and if she has not, then, so far as I know, there is no case which suggests that the husband can escape liability.

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[1] [1952] 2 Q.B. 648.

[2] Ibid. 658.

[3] (1830) 1 B. & Ad. 227, 230.

[4] [1920] 3 K.B. 381.

Our attention was very properly called by Mr. Cassel to certain cases which have been decided in the Probate, Divorce and Admiralty Division and which, at first sight, appear to support his proposition that if there has been a consensual separation without any provision being made by the parties for the husband to pay maintenance to his wife, the wife cannot recover. That is true so far as the machinery, if I may use the expression, of, or the rights given by, the Summary Jurisdiction (Separation and Maintenance) Acts are concerned, because under those Acts the wife is seeking a sum of money from the court and saying: "My "husband has failed to support me. I ask you to order that he "pay me a sum of money." At common law a wife never had the right to ask for a sum of money, and if her husband did not support her, she had no right of action against him; she could not sue him for a sum of money at common law nor could she do so under the Married Women's Property Act, 1882. The most that she could do was to pledge the husband's credit—of course a very unsatisfactory remedy, at any rate for a woman of the working class, because the local grocer and butcher would not be likely to supply her with food on the off-chance that he might possibly be able to recover it from the husband, who might have gone to the other side of England. The legislature therefore stepped in and provided that where a man has deserted his wife or has failed to supply her with proper maintenance, justices can make an order against him. Where the parties have separated by mutual consent the wife cannot avail herself of that remedy, for the husband is not guilty of wilful refusal to maintain her since they have parted on the terms that he is not to maintain her, but that does not conclude the matter when the wife becomes destitute and has to go to the National Assistance Board for her maintenance. She still remains the man's wife. She is still in the position of a woman who has not committed any matrimonial offence, yet she is in the position that she has no means of supporting herself; it may be that her husband 10 or 15 years ago agreed to pay her maintenance at a rate which in those days was adequate, but which has become wholly inadequate owing to the fall in the value of money. The husband, as I say, still remains the husband and the marriage tie still subsists, and we are asked to say in this case that under those circumstances the wife is to be supported by the ratepayers, or now by the taxpayers, rather than by her husband. It is quite clear that *National Assistance Board* v. *Wilkinson*[6] gives no warrant for any such conclusion. That case decided no more than that a husband is under no liability to support his wife if she has been guilty of a matrimonial offence. If she has committed adultery or remains in a state of desertion, the husband is not bound

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[5] [1952] 2 Q.B. 648, 657.

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[6] [1952] 2 Q.B. 648.

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to support her and, therefore, the National Assistance Board, if they support her cannot recover from the husband.

In my opinion, where there is no matrimonial offence, the husband remains under an obligation to support his wife and, indeed, that is the foundation of the decision in *National Assistance Board* v. *Prisk.*[7] In that case I endeavoured to explain, as I have endeavoured to explain today, what was the real decision in *Wilkinson's* case.[8] After again citing the dictum of Littledale J. in *Rex* v. *Flintan* [9] with regard to an adulterous wife, I said [10]: "The law is different where the wife has deserted her "husband." [*Jones* v. *Guardians of Newtown and Llanidloes* [11]] "laid down that the right to maintenance of a wife who has "deserted her husband is only suspended, and if she returns to "her husband then she has a right to be maintained; but as long "as she is in desertion the husband is under no obligation to "support her. In *Wilkinson's* case [12] the wife was in desertion. "The husband provided a perfectly proper and adequate home for "the wife, but she wanted to live elsewhere and would not go and "live with him. It was decided that in such circumstances the "husband was not bound to support the wife, and it decided "nothing else. Similarly, in the present case, if the husband could "say that the wife had deserted him, he would be under no "obligation to maintain her."

National Assistance Board v. *Prisk* [13] becomes very much in point when I turn to the second case which we are considering, the case of *National Assistance Board* v. *Parkes.* In that case there was also a separation, but the parties were in a different class of life from the parties in the case of Stopher, and they separated under a deed which provided: "That the wife will not "at any future time be or claim to be entitled to any financial "provision whatsoever from the husband in respect of herself "and the said child or either of them, and that she will not at "any future time pledge the credit of the husband and will at all "future times keep the husband and his estate and effects fully "and effectually indemnified against all debts and liabilities." The deed also contained a clause against molestation or proceedings being taken in the Divorce Court. Before the proceedings in the magistrates' court the husband had agreed to pay his wife a sum for the child. The wife became destitute and had to go to the National Assistance Board, and the justices held that the deed was a bar to their making any order on the husband. In my opinion, that decision cannot be supported, and it is entirely contrary to the true ground upon which *National Assistance Board* v. *Prisk* [13] was decided. In *Prisk's* case [13] the husband had agreed to pay one pound a week to his wife and that was all, but because of the fall in the value of money the one pound a week was not enough; this court decided that when the National Assistance Board had increased her income by giving her assistance the husband was bound to repay. What difference can it make that in one case he agreed to give her one pound a week and in the other an agreement was made under which he was to undertake no liability? The answer is that the court is not bound by the agreement between the parties. It must ascertain what is reasonable maintenance for the wife, and if she has not committed any matrimonial offence, any reasonable allowance which the National Assistance Board give her can be recovered from the husband.

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[7] [1954] 1 W.L.R. 443.

[8] [1952] 2 Q.B. 648.

[9] 1 B. & Ad. 227, 230.

[10] [1954] 1 W.L.R. 443, 445.

[11] [1920] 3 K.B. 381.

[12] [1952] 2 Q.B. 648.

[13] [1954] 1 W.L.R. 443.

There is, however, a provision in the Act, as there was in the Act of 1868, which enables the justices to look at all the circumstances of the case, including the means of the husband. If the husband was an old age pensioner hardly able to keep body and soul together, or if he was in receipt of national assistance himself, those would be circumstances in which the justices probably would not think of making any order. There may be other cases in which the justices come to the conclusion that if the wife were to act more reasonably the parties might come together, and there again, they might think that in all the circumstances of the case it would not be right to make the husband pay a proportion of his income to his wife because they might think that the wife was a good deal more to blame for the state of affairs than her husband. But apart from those considerations, the obligation upon a man to maintain his wife remains unless and until the wife commits a matrimonial offence. If during the time the marriage subsists the wife becomes destitute or substantially destitute and the National Assistance Board, who now occupy the position formerly occupied by the Poor Law Boards of Guardians, give her reasonable maintenance, they are entitled to recover what the justices think reasonable from the husband who has not, in fact, provided—I will not use the words "failed to provide"—money for the wife.

The cases which were cited to us from the Probate, Divorce

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[13] [1954] 1 W.L.R. 443.

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and Admiralty Division concern an entirely different state of things. They lay down that if there is a consensual separation, a wife cannot avail herself of the provisions of the Summary Jurisdiction (Separation and Maintenance) Acts and apply to the magistrates' court for maintenance. She made her bargain and she cannot take advantage of the provisions of those statutes, and her only remedy is to go to the National Assistance Board. If the board, coming to the conclusion that she is destitute, relieve her, then, even though the husband could not be made to pay under the Summary Jurisdiction Acts, he would have to repay the Board under the National Assistance Act.

For these reasons, in my opinion, the appeal in Stopher's case is dismissed. The appeal in Parkes' case is allowed and that case must go back to the justices with a direction that they must further hear the case and come to a conclusion as to what is a proper sum to be allowed to the wife under the Act.

Ormerod J. I agree for the reasons set out by my Lord.

Gorman J. I agree, and would add only two observations: first, that it is important to realize that we are concerned in these cases only with the rights given to public assistance under the National Assistance Act, 1948, and secondly, that it is right to point out that the decision of this court in *National Assistance Board* v. *Wilkinson* [14] must be read in relation to, and only in relation to, the facts of that case.

Orders accordingly.

Solicitors: *Field, Roscoe & Co. for Gotelee & Goldsmith, Ipswich; Gibson & Weldon for Archer & Wilcock, Nairobi; Solicitor, National Assistance Board.*

J. F. L.

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[14] [1952] 2 Q.B. 648.

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Sale of Goods—F.O.B.—Export licence—Contract made in London—F.A.S.—Goods to be shipped from foreign port—Prohibition of export without licence—Goods delivered at port by sellers' suppliers—Failure to obtain export licence—On whom duty to apply for licence.

By a contract of sale made in London, the buyers (of New York) agreed to buy from the sellers (of London) 300 metric tons of

Portuguese gum spirits of turpentine f.a.s. buyers' tank steamer at Lisbon, payment by confirmed irrevocable credit in sellers' name in Lisbon. The sellers understood that the destination would be Eastern Germany. The buyers duly sent a tank steamer to Lisbon where the goods had been assembled by the sellers' Portuguese suppliers. Under Portuguese law turpentine could not be exported without an export licence, which had to be obtained by the suppliers. The sellers' suppliers applied to the Junta for a licence to export to Rostock, which was refused, and the turpentine could not be delivered alongside the buyers' ship. Each party to the contract alleged that the other was in default under it in failing to obtain the necessary licence:—

Held that, since the contract was made in England for shipment from Portugal, and the sellers alone were in touch with the suppliers, through whom alone an export licence could be obtained, and the contract did not restrict the buyers from shipping to Rostock, it was for the sellers to obtain a licence, and if it was impossible to secure one for a particular port, it was for them to have inserted a provision in the contract barring shipment to that port. Accordingly, the buyers were not in default.

H. O. Brandt & Co. v. *H. N. Morris & Co. Ld.* [1917] 2 K.B. 784 distinguished.

Judgment of McNair J. reversed.

APPEAL from McNair J.

M. W. Hardy & Co. Inc., of New York (hereinafter referred to as the buyers), entered into an oral contract in London on April 19, 1951, with A. V. Pound & Co., of London (the sellers), under which the former agreed to buy from the latter 300 metric tons of Portuguese gum spirits of turpentine of good merchantable quality at a price in U.S. dollars equivalent to 11,000 escudos per 1,000 kilos net, f.a.s. buyers' tank steamer at Lisbon, during the second half of May, 1951, payment by confirmed irrevocable credit in sellers' name in Lisbon. The contract was confirmed in writing, and its terms were set out in a sale note enclosed with a letter from the sellers to the buyers dated April 20, 1951. The letter stated: "As we understand that the destination will be Eastern Germany payment will be required in free dollars . . ." On the same day the sellers wrote to their suppliers: "We have now been told definitely that the destination of this material is Germany."

By a contract in writing dated April 23, 1951, between the sellers and the Uniao Resineira Portuguesa (hereinafter called "the suppliers") the suppliers agreed to sell and the sellers agreed to buy 300,000 kilos of Portuguese gum spirits of turpentine of good merchantable quality at a price of 10,800 escudos per metric ton, less 2 per cent. commission for the sellers, f.a.s. sellers' tank steamer at Lisbon during the second half of May, 1951, payment by confirmed irrevocable letter of credit in suppliers' favour in Lisbon. That contract was "subject to "usual agreement of the Junta Nacional Dos Resinosos being "granted."

On May 4, 1951, the buyers advised the sellers that in connexion with the contract they had chartered the tanker *Elizabeth B.* with lay days May 20/30, 1951, and they enclosed a copy of the charterparty, which showed that the goods were to be carried from Lisbon to Rostock. On May 8, 1951, the sellers wrote to the buyers: "We thank you for your letter of "yesterday advising us that the owners of the tanker *Elizabeth B.* "have given notice of readiness to load the 300 tons of Portuguese "turpentine, covered by the above contract on the 24/25 instant. "We also confirm our telephone conversation of yesterday "evening when we requested you to arrange for the opening of "a transferable credit, in dollars, in our name with the Banco "Burnay in Lisbon. The credit should be opened for the "equivalent of about Esc. 3,300,000—converted at the official "rate ruling in Lisbon at the time of opening the credit. It "would be as well to allow for a margin on this sum as the "shipping weight may be slightly under or above 300 metric "tons."

On and after May 14, 1951, the contract goods were in Lisbon waiting to be brought forward to the Customs. On May 22 the buyers opened a letter of credit in accordance with the terms of the contract, and on the same day the sellers' suppliers applied to the Junta for an export licence to export the turpentine to Rostock, and on May 24 the Junta refused the application.

On May 27, 1951, the *Elizabeth B.* arrived at Lisbon, and was ready to load on May 29.

On May 29 the sellers wrote to the buyers as follows: "Dear "Sirs, We refer to our recent telephone conversations with "regard to the 300 tons Portuguese turpentine sold to you for "account of your New York office on the 20th ultimo, and "covered by our contract of that date. In our opinion, the "refusal of the Portuguese authorities to grant an export licence "for Rostock does not invalidate the contract which calls for "delivery 'f.a.s. buyers' tank steamer in Lisbon.' The turpen-"tine is available for immediate delivery and we must ask you "to let us have today, new instructions for shipment of the "goods. Yours faithfully, A. V. Pound & Co. Ld. (Sgd.) A. V. "Pound, Director."

The buyers, on receipt of that letter, cancelled the charterparty of the *Elizabeth B.*, and replied: "Dear Sirs, re 300 tons "Portuguese turpentine for Eastern Germany. We are in receipt "of your letter of today's date and would like to inform you that "under no circumstances are we prepared to give you shipping "instructions for any other port than Rostock. The goods were "bought for that port and confirmed by you for shipment to "Eastern Germany. Your inability to ship the goods to Eastern "Germany constitutes a breach of contract and we must hold "you fully responsible for any damages suffered by us in consequence of such default. We have not been able to complete "negotiations with our customer regarding a replacement of the "parcel and we must reserve the right to substantiate our claim "at a later date. We are also holding you responsible for any "damages sustained by us through cancelling the charter of the "steamer *Elizabeth B.* We would like to add that your letter "of the 29th constitutes a complete change of attitude on your "part and we can only gather from this that you do not wish to "continue the amicable and informal negotiations which have "taken place so far and under the circumstances and in order to "safeguard our interest, we propose to continue this correspondence through our legal advisers. Yours faithfully, M. W. "Hardy & Co. Ld."

Those letters set out the main contentions of the parties.

There was an arbitration clause in the contract. Arbitration was claimed, and the arbitrators awarded that the buyers were in default, and assessed the damages payable by the buyers to the sellers at the sum of 300,000 escudos. The buyers appealed to the Board of Appeal of the London Oil and Tallow Trades Association, whose award was stated in the form of a special case.

The board found as follows: "20 (*a*) The buyers required the "said goods for shipment from Lisbon to Rostock in Eastern "Germany. The sellers knew at the time they entered into the "contract that the buyers contemplated Eastern Germany as "the destination for the said goods. (*b*) The sellers did not "disclose to the suppliers at the time of entering into the contract "with the suppliers . . . that the destination of the said goods "was Eastern Germany. (*c*) At all material times it was "unlawful by Portuguese law to export turpentine from Portugal "without an export licence. The Junta Nacional Dos Resinosos

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"(hereinafter called 'the Junta') was the body in Portugal "delegated by the Portuguese Government with the power of "granting export licences for the export of turpentine from "Portugal. (*d*) The Junta controlled all sales of turpentine both "within and from Portugal. By Portuguese law sales of "turpentine within Portugal did not require a licence but could "only be transacted between a registered supplier (of whom the "suppliers in this case were one) and a registered retailer. No "sale of turpentine in Portugal could be transacted between a "registered supplier and a person other than a registered retailer "unless the sale were for export. (*e*) By Portuguese law in a sale "for the export of turpentine the duty of obtaining the necessary "export licence was cast upon the Portuguese supplier, who had "to be registered with the Junta. The Junta would only entertain applications for export licences from suppliers registered "with them. Neither the sellers nor the buyers were registered "with the Junta, either as suppliers or as retailers. (*f*) By "Portuguese law goods cannot be delivered f.a.s. at Lisbon until "they have been cleared through the Portuguese Custom House, "where the necessary export licence must be produced."

The board held, subject to the opinion of the court, that the refusal by the Portuguese authorities of a licence for the export of the contract goods to Eastern Germany operated to discharge the contract between the sellers and the buyers, and accordingly they reversed the award of the arbitrators.

On November 12, 1954, McNair J., having heard argument upon the special case, decided in favour of the sellers and restored, in effect, the award of the arbitrators. The buyers appealed.

Leonard Caplan Q.C. and *Neil Lawson* for the buyers. McNair J. was wrong in re-instating the finding of the original arbitrators that the buyers were in default under the contract. He based his decision on *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ld.*,[1] but that case is clearly distinguishable both in regard to the facts and to the terms of the contract. For example, in *Brandt's* case[1] at the time when the contract was made no licence was required for the export of aniline oil, with which the contract was concerned, but the requirement of a licence was imposed later, a fact of which the parties who both carried on business in Manchester were aware. Lawrence J. held that the

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[1] [1917] 2 K.B. 784.

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duty of applying for a licence in that case fell upon the sellers. The Court of Appeal reversed that decision. Viscount Reading C.J. said [2]: "I am unable to agree with the learned judge that "the duty of applying for the licence was upon the defendants. "They had contracted to sell f.o.b. They had therefore con"tracted to put the oil on board a vessel selected, not by them, "but by the plaintiffs. It was the duty of the plaintiffs to find "the ship, and the facts which it was necessary to state when a "licence had to be applied for were known to them and not to "the defendants." The court therefore held that the buyers, and not the sellers, were in default. In the present case, instead of there being a supervening illegality or impossibility affecting the delivery of the goods, the state of the law of Portugal restricting export existed at the date of the contract. Again, in *Brandt's* case [3] both the buyers and the sellers had the right to apply for a licence, whereas in the present case both were excluded from doing so because the licence could only be applied for by the Portuguese agents of the sellers. It is submitted that the basis of the contract was that the goods should be exportable to Rostock, and the sellers failed to deliver goods which were so exportable. They would have been in a position to deliver the goods with a condition that they were not to be exported to Rostock, but the buyers were not obliged to accept goods with such a condition limiting export. Further, it is submitted that it is necessary for the commercial efficacy of the contract in the present case to imply a term that the contract was "subject to "licence," and, a licence not having been obtained, the contract was discharged. Where parties contract on the basis of, and contemplating, an existing licensing system, there is no absolute obligation to deliver or accept goods in the absence of an express term to that effect: see *In re Anglo-Russian Merchant Traders Ld. and John Batt & Co. (London) Ld.* [4] [*Beves & Co. Ld.* v. *Farkas* [5] was also referred to.]

T. G. Roche for the sellers. McNair J.'s decision was right. In the first place, under the contract it was not the sellers' obligation to supply goods to go only to one place. It was the buyers' duty to provide an effective ship, and a ship which will only go to one place is not an effective one. In the second place, the buyers repudiated the contract before the time for performance had arrived. It was for them, therefore, to justify their repudiation, and they could not do so. The contract was capable of being performed in two ways, one unlawful, i.e., export to Rostock, and the other lawful, i.e., export to a licensed destination. In such a case *Waugh* v. *Morris*[6] shows that the lawful way must be regarded and the unlawful disregarded. If the contract is to be treated as having been made "subject to export licence," that does not mean subject to export licence to one place only, and an export licence could have been obtained (as happened) for shipment to the United Kingdom or to places other than Rostock. In conclusion, an effective ship, which it was the buyers' duty to provide, is one which is legally capable of taking goods abroad. The ship here was not so capable and the buyers were, therefore, in breach of their obligation to provide such a ship, as found by the arbitrators and McNair J. [*Herne Bay Steam Boat Co.* v. *Hutton*[7] was also referred to.]

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[2] [1917] 2 K.B. 784, 795.

[3] [1917] 2 K.B. 784.

[4] [1917] 2 K.B. 679.

[5] [1953] 1 Ll.Rep. 103.

L. Caplan Q.C. in reply. The whole case depends on whether there can be read into the contract a term that the goods were to go to Rostock and nowhere else. The contract was that the goods were to be delivered f.a.s. in the latter part of May in Lisbon. The buyers nominated a ship, which it was not suggested was not an effective one, and the sellers accepted the nomination. Subsequently, owing to the refusal of the licence, they could not deliver the goods alongside that ship. That does not show that there had been any default on the part of the buyers. It could not be right that they should be required to nominate ship after ship until they found one which could take the goods having regard to the existence of the requirement for a licence and the destination of the vessel. If any term was to be implied in the contract, it was one that the sellers should take reasonable steps through their suppliers to obtain the necessary licence.

Cur. adv. vult.

Feb. 25. The following judgments were read.

Lord Goddard C.J. I will ask Singleton L.J. to read the first judgment.

Singleton L.J. This appeal arises out of an agreement for the sale of a quantity of turpentine. The agreement was made in London. The goods to which the contract related were in Portugal. McNair J. held that the buyers were in default and that they were liable in damages for breach of contract. The buyers appeal against that judgment.

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[6] (1873) L.R. 8 Q.B. 202.

[7] [1903] 2 K.B. 683; 19 T.L.R. 680.

[His Lordship stated the facts and continued:] The judgment of the judge appears to be based mainly on the decision of the Court of Appeal in *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ld.*[1] In that case the buyers were a business house in Manchester, and Morris & Co. Ld., the sellers, were manufacturers of aniline oil in the neighbourhood of Manchester. On September 3, 1914, the buyers agreed to buy from the sellers 60 tons of pure aniline oil with deliveries spread over the period from September, 1914, to January, 1915. Mode of delivery f.o.b. Manchester.

After the contract was made the export of aniline oil was prohibited by an Order in Council, but licences to export were granted in certain cases. No deliveries were made in December, 1914, or January, 1915. It is unnecessary to set out the facts. It is sufficient to state that it appeared from the correspondence that during the time the prohibition was in force the buyers left it to the sellers to apply for a licence to export. The sellers, accordingly, applied in September to the Board of Trade for a licence, which was refused, but upon an application in December a licence was granted for a shipment in January, 1915, but the licence arrived too late for shipment during that month. The evidence also showed that in time of war the name and address of the person to whom goods intended for export were to be sent must be stated. The buyers claimed damages for non-delivery of the balance of the 60 tons of aniline oil. The sellers contended that the buyers were not entitled to sue upon the contract; that during the time when the prohibition against export was in existence they were "prevented" from making deliveries within the meaning of condition 1 of the contract; and that, as to the period from September 25 to December 11, the prohibition was removed upon an undertaking given by them, and the only two other manufacturers of aniline oil in this country, to supply the home demand first before exporting any oil; that after supplying the home demand there was no oil or hardly any left for export, and that this amounted to a "prevention." Lawrence J. held that the buyers were parties to the contract and were entitled to sue upon it; that during September, notwithstanding the prohibition, the sellers had in fact exported 20 tons of aniline oil; that as to the period from September 25 to December 11, during which there was no prohibition, the undertaking to the Board of Trade did not amount to a prevention; that in respect of the period after December 11 the sellers, who had taken upon themselves the obligation of obtaining a licence, did not make sufficient applications for a licence; and that, therefore, the sellers had no defence to the action.

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[1] [1917] 2 K.B. 784.

On appeal, it was held by the Court of Appeal that the obligation of applying for a licence lay upon the buyers and not upon the sellers, and the judgment which had been given in favour of the buyers was set aside.

Lord Reading C.J. said [2]: "As regards the December and "January deliveries, the learned judge held that there was a duty "on the defendants to use their best endeavours to obtain a "licence to export the oil, and he was not satisfied that they had "done so; and that, even if the duty was not imposed on them "by the contract, they had taken upon themselves the duty. "I am unable to agree with the learned judge that the duty of "applying for the licence was upon the defendants. They had "contracted to sell f.o.b. They had therefore contracted to put "the oil on board a vessel selected, not by them, but by the "plaintiffs. It was the duty of the plaintiffs to find the ship, "and the facts which it was necessary to state when a licence "had to be applied for were known to them and not to the "defendants. All that the sellers know in such a case is that "they have sold the goods to their buyers. I have therefore "come to the conclusion that there was no such duty on the "defendants as the learned judge has found, and the result is "that the defendants have not committed a breach of the contract "in not delivering in December and January."

Scrutton L.J. said [3]: "The next point is this: This is a "contract to sell 60 tons of aniline oil f.o.b. Manchester. At "the date of the contract there was no prohibition against the "export of aniline oil. In *In re Anglo-Russian Merchant Traders* "*Ld. and John Batt & Co. (London) Ld.*[4] the contract was a c. "and f. contract, and at the date thereof there was an existing "prohibition against export except under a licence. A question "arose as to whose duty it was to obtain a licence. Bailhache J. "held that the person who had contracted to sell undertook to "obtain the licence or to pay damages. This court held that, as "there was a finding of fact that the seller had done all in his "power to get a licence, at any rate his obligation was not higher

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[2] [1917] 2 K.B. 784, 795.

[3] Ibid. 798.

[4] [1917] 2 K.B. 679.

"than that, and that therefore he was not liable. In this case it "becomes necessary to go further and to decide whether in this "f.o.b. contract the obligation to obtain a licence, in case there "should after the making of the contract be a prohibition against "export, lies upon the sellers or the buyers. In my opinion it "lies upon the buyers. The buyers must provide an effective "ship, that is to say, a ship which can legally carry the goods. "When the buyers have done that the sellers have to put the "goods on board the ship. If that is so, the obtaining of a licence "to export is the buyers' concern. It is their concern to have "the ship sent out of the country after the goods have been "put on board, and the fact that under section 8 of the Customs "and Inland Revenue Act, 1879, as amended by section 1 of "the Customs (Exportation Prohibition) Act, 1914, a prohibition "against export includes a prohibition against bringing the goods "on to any quay or other place to be shipped for exportation "does not cast the duty of obtaining the licence on the sellers. "Bringing the goods on to the quay is merely subsidiary to the "export which is the gist of the licence. In my view, therefore, "in a contract of this kind it is for the buyer to get the licence. "It is further said that, if the duty prima facie was on the "buyers to get the licence, in this case the correspondence "shows that the sellers took upon themselves the burden of "getting it. Having carefully considered the correspondence I "have come to the conclusion that there is nothing in it from "which I can say that legally any such burden is placed on "the sellers."

There is no doubt that if the decision in *Brandt's* case[5] covers the case now under appeal the sellers are entitled to succeed. The question for determination is whether on the contract which the court is now asked to consider the duty upon the buyers is the same as it was held to be in *Brandt's* case.[5] There are differences. In the one case the contract was a f.o.b. contract; in the other it is a f.a.s. contract. I do not think that that of itself is of much help. Of more importance are the facts that in *Brandt's* case[5] both contracting parties were Manchester business people, and that they were contracting with regard to something produced in this country which the buyers wished to export. There was no need for a licence to export at the time the contract was made. The buyers alone knew where they wished the goods to go, and to whom they

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[5] [1917] 2 K.B. 784.

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wished them to go, so that they alone could supply the necessary information when a licence to export the goods was required. (See judgment of Lord Reading C.J.[6]) In the case we are considering an export licence from Portugal was necessary at the date the contract was made. That does not appear to have been within the knowledge of the buyers, but it was known to the sellers. The confirmation note of their contract with their suppliers, which is dated April 23, contains the words "Subject to usual "agreement of the Junta Nacional Dos Resinosos being "granted."

McNair J. held that the duty of obtaining an export licence was upon the buyers, or that, at any rate, the risk of failure to obtain the export licence was upon them, and that they were responsible in damages.

On behalf of the buyers it was submitted to this court by Mr. Caplan that that conclusion was wrong, and that on the facts of this case there was no such duty on the buyers. Mr. Roche, on behalf of the sellers, relied upon the decision of this court in *Brandt's* case.[7]

I am unable to see that in the case now under appeal the duty of obtaining an export licence was upon the buyers. I suppose that they got into touch with the sellers because of the sellers' connexion with Portugal; the correspondence shows something of the friendly relationship which existed between the sellers and their suppliers. The buyers could not obtain a licence. It does not appear from a letter of the sellers of May 23 that the buyers were given the name of the suppliers, though the sellers had written to their suppliers on May 8 that they had given the suppliers' name to the buyers. I do not know when the buyers first knew that a licence to export turpentine from Portugal was necessary. The letter from sellers to buyers dated May 29, shows that there had been telephone conversations, and refers to the refusal of the Portuguese authorities to grant an export licence for Rostock. The Portuguese suppliers had written to the sellers on May 25: "As "advised, we did everything possible to obtain the export licence, "so that the goods in question could be shipped to Rostock. "However, for political reasons, this was not possible, as already "explained to Mr. Pound over the telephone." No one appears to have suggested until the trouble arose that the buyers ought to do anything in regard to a licence. The commodity was in Portugal. Both parties seem to have assumed that the suppliers would arrange for a licence. The suppliers and the sellers knew at an early stage that the buyers intended to ship the goods to Rostock, and apparently no difficulty was foreseen. It had been arranged that payment should be made in a way fit for a consignment destined for Germany. How, then, can it be said that the buyers were in default? The sellers say that the goods were ready in Lisbon and could have been put alongside the ship if she had been bound for any place other than Rostock, and that it was for the buyers to obtain an export licence. In other words, they are saying that they would have put the goods alongside if the buyers would undertake not to ship them to Rostock. Is this not seeking to introduce a new term into the contract, to wit, a proviso that the goods are not to be sent to, or put upon a ship bound for, Rostock? If the difficulty as to Rostock had been met, a like question might have been raised in regard to some other port in Eastern Germany, or elsewhere, and on any change there must arise the expense of another letter of credit and of chartering a ship. Normally, in such a case, the buyer has entered into a contract of resale, and forthwith arranges the ship.

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[6] [1917] 2 K.B. 784, 795.

[7] [1917] 2 K.B. 784.

The question to be determined depends on the construction of the contract and on the facts of this particular case. It is not a case in which both parties are in this country and one (the buyer) wishes to export goods from this country. In my view, the duty of the buyers under this contract was to open a confirmed irrevocable transferable credit in the sellers' name in Lisbon and to produce an effective ship at the right time. The buyers complied with both those requirements, and so fulfilled their duty. They cannot be made to pay damages unless they have broken the contract. It was the duty of the sellers to place the goods alongside the ship. They could not do that unless an export licence had been obtained. The buyers knew nothing as to this. One cannot determine the duties of the parties to a contract of this nature without regard to the facts, and among the facts of importance are the place at which the contract is made, the situation of the parties, and the place at which the goods are at the time the contract is made.

In the course of his judgment McNair J. said: "Of course, "it must be borne in mind that, even on such a finding the "proper law of the contract is English, it may still be the fact "that in so far as the performance is to be carried out in "Portugal that part of the contract has to be regulated by "Portuguese law." With that I respectfully agree. I would add that though both parties must be assumed to know the law of this country, no such assumption arises in the case of the law of Portugal. The sellers were in a better position to deal with any question as to a licence than were the buyers, for they, in turn, were contracting with Portuguese suppliers.

In the circumstances I consider that the duty of obtaining the licence was upon the sellers rather than upon the buyers; the sellers were in touch with their suppliers, through whom alone a licence to export could be obtained. It is not necessary to say more than that I cannot see that there was any such duty upon the buyers, who do not ask for damages against the sellers. It may be that the question of licence was overlooked on both sides, or that neither realized that, in the absence of an export licence, the contract could not be fulfilled.

The judgment of Scrutton L.J. in *Brandt's* case [8] does not cover every f.o.b. contract, still less every f.a.s. contract. From the business point of view it appears to me that it was more convenient, to say the least, that the sellers should deal with any question as to export licence from Portugal through their suppliers—and that seems to have been the intention. I know of no principle of law which prevents the court having regard to those matters. On the facts of the present case I am unable to see that the buyers were in default, and in my opinion the judgment of McNair J. to that effect cannot stand.

Mr. Roche raised a further point to the effect that by their letter of May 29, 1951, the buyers repudiated the contract before time for its performance had expired. I do not think that there is any substance in this. The letter was in reply to a letter of the same date from the sellers in which they set up their case and asked for further instructions to which, on the view I have expressed, they were not entitled. I would allow the appeal and order that the judgment in favour of the sellers be set aside.

Lord Goddard C.J. I confess to finding this a difficult case, and while I am reluctant to differ from McNair J. in a case of this nature, I have come to the conclusion that the award of the appeal committee is right. McNair J. based his judgment on that of this court in *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ld.*,[8] but in my opinion there are very material differences between that case and the present. In *Brandt's* case [8] the contract was between two English companies for the sale of goods in England f.o.b. and was made at a time when an export licence was not required. Subsequent legislation required a licence to be obtained. As the buyers knew to what country they wanted the goods shipped it was for them to obtain a licence. That in the present case the contract was f.a.s. and not f.o.b. is in my opinion immaterial. What is material is that in the present case the contract was made in England for shipment of goods from Portugal, where, at the time the contract was made, Portuguese law required an export licence before the goods could be put alongside. A further requirement of Portuguese law was that the only persons who could get a licence were the persons who supplied the goods to the sellers, and it was to the suppliers and not to the sellers that any licence would be granted.

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[8] [1917] 2 K.B. 784.

I agree with McNair J. that the proper law of the contract is English, but that its performance must be regulated by the law of Portugal. The buyers would not know the suppliers, nor would the sellers be likely to disclose their names to the buyers, and, at any rate, they never did. What I may, perhaps, call the impact of Portuguese law on the contract makes the vital distinction between the present case and *Brandt's* case,[9] and, in my opinion, it was for the sellers here and not the buyers to obtain, or, at least, to do their best to obtain, a licence which would enable the goods to be put alongside. Then it is said that the sellers were always ready, willing and able to obtain a licence which would have enabled the goods to be put alongside a ship for any destination other than Rostock. The contract is silent as to the destination of the goods, and no assistance is given, in my opinion, to either party by the price being payable in U.S.A. dollars equivalent to an amount of Portuguese currency.

The buyers sent a ship, and the contract did not restrict them from sending one bound for Rostock; on the other hand, the sellers had not promised to supply goods that could be sent there. The law of the place of performance, however, prevented them from putting goods alongside the ship that was sent, in the absence of a licence, and one could not be obtained for export to the port for which the ship was chartered. I cannot see that there was any obligation on the buyers to send another ship or get the charter of the ship they sent altered. In the circumstances of this case, it was, in my opinion, for the sellers to get a licence, and if it was impossible for them to get one for a particular port, it was for them to have made a provision in the contract barring shipment to that port.

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[9] [1917] 2 K.B. 784.

With regard to the second point raised by Mr. Roche as to what he contended was the premature cancellation of the contract by the buyers, I have nothing to add to what Singleton L.J. has said. It is abundantly clear that no licence for Rostock could have been obtained. For these reasons I am of opinion that the loss must lie where it falls, and I would allow this appeal and restore the award of the appeal committee.

Romer L.J. (read by Lord Goddard C.J.). In my opinion this is by no means an easy case, and one of the main difficulties, as it appears to me, is whether the line of reasoning which led this court in *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ld.*[10] to decide against the buyers is, or is not, applicable to the present case. That reasoning appears from the following passages from the judgments of Viscount Reading C.J. and Scrutton L.J. respectively. "I am unable" said Lord Reading C.J.[11] "to "agree with the learned judge that the duty of applying for the "licence was upon the defendants [the sellers]. They had con-"tracted to sell f.o.b. They had therefore contracted to put the "oil on board a vessel selected, not by them, but by the plaintiffs "[the buyers]. It was the duty of the plaintiffs to find the "ship, and the facts which it was necessary to state when a "licence had to be applied for were known to them and not to "the defendants. All that the sellers know in such a case is "that they have sold the goods to their buyers."

Scrutton L.J., after observing that in his opinion the obligation to obtain the export licence which was there in question lay upon the buyers, proceeded[12]: "The buyers must provide an "effective ship, that is to say, a ship which can legally carry "the goods. When the buyers have done that the sellers have "to put the goods on board the ship. If that is so, the obtaining "of a licence to export is the buyers' concern. It is their concern "to have the ship sent out of the country after the goods have "been put on board, and the fact that . . . a prohibition against "export includes a prohibition against bringing the goods on to "any quay or other place to be shipped for exportation does not "cast the duty of obtaining the licence on the sellers. Bringing "the goods on to the quay is merely subsidiary to the export "which is the gist of the licence."

Founding themselves upon these observations of Lord Reading C.J. and Scrutton L.J., the sellers say that it was the buyers alone who, in the present case, knew where they wanted to send the goods when they contracted to buy them; that under the contract they could nominate any destination they pleased; that such destination was their concern and not the concern of the sellers; and that, accordingly, it was for them and not for the sellers to procure the licence which was necessary to enable the goods to be sent to the port of their selection.

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[10] [1917] 2 K.B. 784.

[11] Ibid. 795.

[12] Ibid. 798.

This incorporation in the sellers' argument of the reasoning in *Brandt's* case [13] is not, I think, without considerable attraction. I have, however, come to the conclusion on the whole that that reasoning is not applicable to the present case, which differs in important respects from the facts to which the court was addressing its mind in *Brandt's* case.[13] My Lords have drawn attention to those differences in the judgments which they have delivered, and I do not propose to repeat them. The most important element of difference, as I see it, is that in the present case the sellers knew and were in touch with the proper, if not the only, persons in Portugal (namely, their suppliers) by whose efforts an export licence could be obtained, whereas the buyers not only did not know who the suppliers were, but would have had no means of compelling them to apply for a licence even if they had known.

This and other considerations to which my brethren have referred displace, in my opinion, the application of the judgments in *Brandt's* case [13] which have, of course, to be read in relation to the particular contract which was then before the court and to the circumstances relevant to its construction. When one adds to the above considerations the undoubted fact that the sellers were told by the buyers on April 20, 1951 (which was the date on which the oral agreement of the previous day was confirmed in writing), of the intended destination of the goods there is sufficient ground, in my judgment, for implying that the sellers assumed the obligation of obtaining, or of trying to obtain, the necessary licence; or, at the least, that this obligation was not intended to be imposed upon the buyers. Notwithstanding, therefore, the attractiveness of the sellers' argument, I think on the whole that it ought not to prevail, and that this appeal should be allowed.

Appeal allowed.

Solicitors: *Thomas Cooper & Co.; Crawley & de Reya.*

P. B. D.

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[13] [1917] 2 K.B. 784.

KUENIGL *v.* DONNERSMARCK AND ANOTHER.

[1950 K. No. 1556.]

1954
Oct. 26, 27, 28, 29;
Nov. 1, 2, 3, 4, 5;
Dec. 3.

McNair J.

Trading with the Enemy — Company — Incorporated in England — Enemy control—Effect in English law. Agreement—Made before outbreak of war—Conditions precedent not fulfilled on outbreak of war—Whether agreement abrogated or suspended—Whether clauses severable—Whether illegal by statute—"Any person"—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 1.

A company incorporated under the laws of England and registered in England, and so having an English domicile and, by analogy, British nationality, does not cease by English law to be an English company subject to English law by reason of the fact that it is under enemy control. Enemy control may operate to the prejudice of an English company by conferring upon it enemy character, but it cannot confer upon it benefit so exonerating it from the operation of English law.

Elders & Fyffes Ld. v. *Hamburg Amerikanische Packetfahrt Actien Gesellschaft* (1917) 34 T.L.R. 275; *The Unitas* [1948] P. 205; [1948] 1 All E.R. 421; *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co. (Gt. Britain) Ld.* [1916] 2 A.C. 307; 32 T.L.R. 624 considered.

In 1921 the first defendant, an Austrian national, became, upon the death of his father, heir to certain mines at Beuthen, Upper Silesia. Owing to political uncertainty he caused a company to be incorporated in England which took over the Beuthen mines. The registered office was at all material times in London, but up to the outbreak of war in 1939 eight of the directors, who held the major proportion of the issued shares, were resident in Germany, two were resident in Great Britain and one in Belgium. Between 1926 and 1931 the company carried out transactions in the United Kingdom, but up to the outbreak of war the management and control of its affairs were exercised in Germany.

In 1923, the plaintiff, a Hungarian national then resident in Austria, took over by assignment certain claims against the first defendant in respect of his deceased father's estate. Those claims were eventually compromised by an agreement in 1929 between the plaintiff, the first defendant and the company whereby the first defendant agreed to pay to the plaintiff certain annual sums in gold marks, payable quarterly, for 15 years, the company guaranteeing the payments. The first defendant defaulted and litigation followed in the Austrian courts, which was compromised in 1939 by a further agreement concluded on May 19–20 between the same parties. By that agreement the company undertook to pay to the plaintiff, or by his direction to his creditors, 160,000 reichsmarks, the payment being subject, inter alia, to the ratification of the settlement by the relevant Exchange Control Office (Austria having become incorporated into the German Reich and the plaintiff then being resident in Hungary), and the termination of bankruptcy proceedings started by the first defendant against the plaintiff in 1934. The defendant company also agreed to pay to the plaintiff £600 towards his legal costs in London. A number of disputed claims were also vested in the company so that certain "reserved "questions" referred to in the agreement might be decided in one legal action in the provincial court at Beuthen. The agreement as a whole was subject to conditions precedent which were not performed.

In February, 1940, the parties, by their legal advisers in Beuthen and Breslau, purported to enter into a new agreement to replace the 1939 agreement. Pursuant to that agreement payment of 160,000 reichsmarks was made out of the defendant company's funds in Germany to the plaintiff in Hungary or to his creditors in Germany. By 1945, when Beuthen was occupied by the Russians, the "reserved questions" had not been settled, and before the issue of the writ in the action the court at Beuthen came under Polish administration.

In 1950 the plaintiff commenced these proceedings against the first defendant as principal creditor and the company as guarantor claiming sums alleged to be due under the 1929 agreement. The defendants, relying on the 1939 and 1940 agreements, denied that any sums were due other than those found to be due on the resolution of the "reserved questions." Preliminary issues were accordingly tried as to the validity and effect of the 1939 and 1940 agreements:—

Held, (1) that the 1939 agreement (apart from the effect of the English law relating to trading with the enemy) never came into effect as the conditions precedent thereto had not been fulfilled.

(2) That, on the facts, by English law, on the principle laid down in *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co. (Gt. Britain) Ld.* [1916] 2 A.C. 307; 32 T.L.R. 624 the company was a company having an enemy character.

(3) That the company did not cease to be an English company by reason of the fact that it was under enemy control and had thus acquired enemy character. It remained subject to all the prohibitions imposed by English law (including those imposed by section 1 of the Trading with the Enemy Act, 1939) and, therefore, the authority of its directors or agents in enemy territory was automatically determined on the outbreak of war so that in English law no act purporting to have been performed in Germany on behalf of the company could be taken to be the act of the company and no agreement made by persons in Germany purporting to act on behalf of the company could be taken to be the agreement of the company. Therefore the agreement made in 1940 could not be taken to be the agreement of the company.

(4) That, assuming that the 1939 agreement had come into effect, it would have been abrogated by the outbreak of war since the fulfilment of the obligations thereunder would necessarily have involved benefit to and intercourse with the enemy.

(5) That it was not possible to sever those parts of the 1939 agreement which involved benefit to or intercourse with the enemy

from the parts which did not: (a) because the doctrine of severability which in certain circumstances was applicable to cases relating to covenants in restraint of trade was not applicable to an agreement which offended against the trading with the enemy law; and (b) because the parts sought to be severed were not supported by separate consideration.

(6) That the 1939 agreement could not have been suspended as it did not by its terms merely provide a method of discharging an accrued right arising from the 1929 agreement, but, if implemented, would have created a new obligation to pay to the plaintiff not gold marks but reichsmarks, would have substituted the company for the first defendant as principal debtor and would have discharged the first defendant.

Ertel Bieber & Co. v. *Rio Tinto Co. Ld.* [1918] A.C. 260; 34 T.L.R. 208 applied; *Schering, Ld.* v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219; [1946] 1 All E.R. 36 distinguished.

TRIAL OF PRELIMINARY ISSUES.

In 1920 the plaintiff, Count Philip Kuenigl, an Austrian national resident in Hungary, married the grand-daughter (by a daughter) of the head of the Austrian von Donnersmarck family. In 1921 the grandfather died and the first defendant (his son), Count Alfons von Donnersmarck, became universal heir of the estate, which included valuable mines at Beuthen in Upper Silesia. In view of the political uncertainty as to the fate of Upper Silesia under the Peace Treaties, the family in 1921 caused to be incorporated in England the defendant company, the Henckel von Donnersmarck Beuthen Estates Ld., to which was transferred, inter alia, the Beuthen mines. In 1923 the plaintiff took over by assignment the claims of his mother-in-law against the first defendant in respect of her father's estate, the consideration being the payment to her by the plaintiff of a certain sum, and his undertaking to pay over to her 35 per cent. of his recovery from the first defendant. The plaintiff then brought proceedings against the first defendant in the provincial court of Klagenfurt in Austria, which resulted in a compromise agreement dated May 24, 1924, under which, in settlement of all the claims of the mother-in-law in the estate of her father, the first defendant agreed to pay to the plaintiff 3,100,000 gold marks by two instalments of 100,000 gold marks, and the balance by further instalments extending over a period from July 1, 1925, to July 1, 1934. In 1928, the instalments being in default, the plaintiff commenced proceedings in the court of Breslau and the court of Klagenfurt to recover the arrears. Those proceedings in turn resulted in 1929 in a further compromise agreement whereby the actions were withdrawn on the terms, inter alia, that the first defendant should pay to the plaintiff 1,300,000 gold marks by annual payments extending over a period of 15 years, and that the defendant company should guarantee the obligations of the first defendant (subject to a proviso in the event of a mortgage over the Beuthen mines being granted to the plaintiff). The payments under this agreement were made only up to January 1, 1932.

In 1934 the defendant company, having purchased certain claims by third parties against the plaintiff, commenced bankruptcy proceedings against him in the provincial court of Klagenfurt. After other litigation by the defendants against the plaintiff had terminated in a decision in the plaintiff's favour, an agreement was concluded on May 19, 1939 (by which time Austria had been incorporated in the German Reich) between the plaintiff, stated to be " of Sohven, Hungary," the first defendant, and the defendant company. By that agreement the defendant company were to terminate the bankruptcy proceedings and undertook to pay to the plaintiff, or on his instructions direct to his creditors, 160,000 reichsmarks (less one-half of the bankruptcy costs): that payment to be made as soon as the settlement had been ratified by the Exchange Control Office and the plaintiff had communicated that an understanding had been reached between him and his bankruptcy creditors and one other creditor. The plaintiff, having disputed the amount of 14 claims by third parties scheduled to the agreement, provision was made for the vesting of those claims in the defendant company so that certain " reserved questions " relating to those claims might be determined in one legal action, it being agreed that " the provincial " court of Beuthen shall have jurisdiction for such legal " proceedings," all questions of prescription being reserved. The defendant company also agreed to pay to the plaintiff £600 in connexion with certain legal costs incurred by him in London.

By clause 15 of the agreement: " The foregoing part settle-" ment is made with effect from the date of cancellation of the " bankruptcy proceedings. The validity of the settlement " remains subject to an understanding being reached between " [the plaintiff] of the one part and the bankruptcy creditors " and [the other creditor] of the other part regarding the settle-" ment of their claims."

The Exchange Control Office in Troppau notified agreement with the compromise, but stipulated that special permits would be required for payment to foreigners, which included the plaintiff, then resident at Sohven in Hungary, and for the payment of the £600. Difficulty arose in obtaining the creditors' consent to the withdrawal of the bankruptcy proceedings, and they were not in fact terminated until February, 1940, nor, up to February 27, 1940, was a settlement reached between the plaintiff and his principal creditor.

Meanwhile, by the incorporation of Eastern Upper Silesia in the German Reich the first defendant became a resident in Germany for exchange control purposes, and as a result of the outbreak of war it became impossible for the defendant company to perform their obligation to pay the £600 as had been contemplated and, accordingly, in March, 1940, the parties purported to enter into a new agreement. The new agreement followed the same lines as that of 1939 except that it took account of the termination of the bankruptcy proceedings and the settlement with the creditors, and the obligation to pay the £600 was altered to an obligation to pay 11,000 lire; special provision was made for dealing with the outstanding claim of the principal creditor. Pursuant to that agreement payment was made out of the funds of the company in Germany to the plaintiff in Hungary, or by his directions to his creditors, mostly in Germany, of the sum of 160,000 reichsmarks, but up to 1945, when Beuthen was overrun by Russian forces, the "reserved questions" had not been determined by the court of Beuthen, though proceedings had been instituted. The following agreement was reached as to the status of the Provincial Court of Beuthen: "That this Landgericht "(Provincial Court) at Beuthen throughout 1939 and 1940 was a "court forming part of the German judicial system. In the year "1945 Beuthen was occupied by Russian forces and later, before "the issue of the writ herein, came under Polish administration "and any court at Beuthen since the year 1945 has formed part "of the Polish and not the German judicial system."

The following summary of the facts as to the incorporation and pre-war activities of the defendant company is taken from the judgment.—The company was incorporated on December 2, 1921, with an authorized capital of £500,000 divided into 500,000 £1 shares. At all material times the registered office of the company was in London. The primary purpose of its incorporation (though not so stated amongst the statutory objects) was to take over the valuable mines owned by the Henckel von Donnersmarck family situated at Beuthen in Upper Silesia, the fate of which was thought to be uncertain pending the holding of a plebiscite on the status of the Silesian Triangle under the Peace Treaties. During the period from 1926 to 1931 the company carried out large transactions in the United Kingdom principally for financing its coal interests, and advances were obtained through various banking houses in London; but the exchange restrictions following on the financial crisis of 1931 made it impossible for the company to repay these advances to their British creditors. These outstanding advances as at January 9, 1947, were stated by the company to amount to £239,847. For some years before and up to the outbreak of war, out of the 11 directors eight were resident in Germany, two in Great Britain and one in Belgium.

At the outbreak of war out of the 490,500 issued shares 2,502 shares were held by the two English directors, one by the Belgian director, 75,000 by Branch Nominees Ld. on behalf of an English bank, and the remainder were held by or on behalf of the German directors. At the outbreak of war and for some years before no business of the company had been transacted in England. The whole management and control of the company was and had been exercised from Germany. The seal of the company was kept in Germany and all board meetings were held there, and the business of the company was transacted in Germany by the German directors without reference to the English directors. At the outbreak of war the assets of the company in England consisted of a bank balance of £15 with the National Provincial Bank, 66,800 shares (the value of which was not proved) in the Southern European Metal Corporation Ld., an English registered company, a bank balance of £294 with the Westminster Bank, on which the bank claimed a lien, and 8,495 shares of the Hugohutte Chemical Corporation Ld. out of 8,500 issued shares, this being a company formed by the Henckel family for the purpose of holding other interests in Germany.

In 1950 the plaintiff issued a writ claiming against the defendant as principal debtor or, alternatively, against the defendant company as guarantor, the sum of £188,729 in respect of principal and interest due under the 1929 agreement, on the footing that the 1939 and 1940 agreements were to be wholly disregarded as being of no legal effect in English law. He was prepared to give credit for the 160,000 reichsmarks paid out of the funds of the company in Germany. Alternative claims were put forward under the 1939 and 1940 agreements if, contrary to the plaintiff's contention, those agreements or either of them were effective agreements in English law. The first defendant and the defendant company claimed, inter alia, that the 1929 agreement had ceased to have any effect by reason of the conclusion of the compromise agreements made in May, 1939, and February, 1940. They claimed that the English law relating to trading with the enemy was not applicable to and did not render unlawful the making, conclusion or performance of the 1939 and 1940 agreements, as they were governed exclusively by German law, as the place of business and seat of management of the defendant company was at Beuthen in Germany, and it was controlled and directed by persons who, on September, 1939, became enemies for the purposes of English law relating to trading with the enemy.

By an order of Master Harwood the following preliminary issues were ordered to be tried: 1 (*a*) Was there a compromise agreement concluded between the plaintiff and the first defendant and the defendant company on May 19/20, 1939, as alleged by the first defendant and the defendant company? If so, (*b*) was the agreement of full force and effect between the parties? If so, (*c*) must the rights (if any) of the plaintiff against either or both defendants be determined in accordance with the agreement? If so, (*d*) had the plaintiff the right to have the six disputed questions set out therein determined in the present action? (*e*) Did the agreement upon its true construction afford a defence to either or both defendants against the claims of the plaintiff in the present action, excluding claims which arose on the disputed questions if the answer to (*d*) was affirmative? 2. If the answer to 1 (*e*) was negative, (*a*) was there a compromise agreement concluded between the plaintiff and the first defendant and the defendant company, as alleged by the defendant and the defendant company on February 22, 1940? If so, (*b*) was the agreement unlawful by reason of English law relating to trading with the enemy, as alleged by the plaintiff? If not, (*c*) must the rights (if any) of the plaintiff against either or both the defendants be determined in accordance with the agreement? If so, (*d*) had the plaintiff the right to have the six disputed questions determined in the present action? and (*e*) did the agreement upon its true construction afford a defence to either or both defendants against the claims of the plaintiff in the present action, excluding claims which arise on the disputed question if the answer to (*d*) was affirmative?

Leonard Caplan Q.C. and *Mark Littman* for the plaintiff. The issues are (1) whether an agreement was in fact made in May,

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1939, between the plaintiff and the defendants and, if made, whether it was abrogated on the outbreak of war or, alternatively, became illegal by virtue of the Trading with the Enemy Act, 1939; (2) whether a further agreement alleged to have been made in March, 1940, was made at all and, if made, affected the position of the parties, or whether by virtue of the trading with the enemy law that agreement was of no effect; (3) whether, if either of those agreements was effective, the English court is precluded from adjudicating upon certain matters arising out of them by virtue of clauses therein conferring jurisdiction upon a specific foreign court.

Although an agreement was signed in May, 1939, it was not to come into operation until certain conditions had been fulfilled. Those conditions were not in fact fulfilled and therefore the agreement never came into effect. Even if it did come into effect, it was still executory at the outbreak of war and the performance by the defendants of their obligations thereunder would have involved intercourse with the enemy across the line of war. At common law all contractual obligations of an executory nature between a British subject and a territorial enemy are abrogated if they involve intercourse with or benefit to the enemy. For these purposes a company registered in England and owing its corporate existence only to English law is to be regarded as a British subject: *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[1] Even if a company acquires enemy character it is still, by analogy, a British subject: *Janson* v. *Driefontein Consolidated Gold Mines Ld.*[2]

[McNAIR J. referred to *Elders & Fyffes Ld.* v. *Hamburg Amerikanische Packetfahrt Actien Gesellschaft.*[3]]

The effect of that decision is that a person cannot, by cloaking himself with enemy character, obtain freedom from the laws of the country to which he is generally subject. A company is domiciled in the country in which it is registered, and that domicile clings to it throughout its life: *Gasque* v. *Inland Revenue Commissioners.*[4] That might be sufficient for the purpose of the plaintiff, but it is submitted that on the facts of the case the defendant company is not only domiciled but resident in England. The authorities as to the residence of a company are mainly income tax cases: see, for example, *Swedish Central Railway Co.* v. *Thompson*,[5] where it was held that for income tax purposes

[1] [1918] A.C. 260; 34 T.L.R. 208.

[2] [1902] A.C. 484; 18 T.L.R. 796.

[3] (1917) 34 T.L.R. 275.

[4] [1940] 2 K.B. 80.

[5] [1925] A.C. 495; 41 T.L.R. 385.

a company may have more than one residence. In that case Viscount Cave L.C., obiter, said [6] that the same thing applied for the purpose of founding jurisdiction. Contrast *Egyptian Delta Land and Investment Co. Ld.* v. *Todd*,[7] where it was held that the residence of a company, whether British or foreign, for income tax purposes was preponderantly if not exclusively determined by the place where its real business was carried on. If a commercial debt is incurred in this country by way of trade by a person then resident in England, he is "carrying on business" here until the debt is paid, even if he has left this country: *Theophile* v. *Solicitor-General*.[8] "Carrying on business," as far as a company is concerned, is equivalent to residence. Up to the outbreak of war the defendant company was resident in England because it carried on business in England within the meaning of that phrase in *Theophile* v. *Solicitor-General*.[8] The court is here dealing with a question of public policy, not a taxing statute, and the test of residence is less stringent.

[McNAIR J. There are two matters to be considered: (1) whether the company was subject to the Trading with the Enemy legislation, and (2) whether a contract made by the company is void at common law by reason of public policy. The latter point does not depend on nationality and therefore your expression "British subject" is not relevant.]

That expression has been used consistently in the cases. In relation to a company, whether the test, by analogy, is that of a natural-born British subject, or a domiciled person, or a person resident in England, the defendant company falls within it. On the assumption that the company is resident in England the agreement is void on grounds of public policy if there are obligations which involve intercourse with a territorial enemy. The test is, would the performance of this agreement by this English company, acting in the only way it can, by its authorized agents, involve intercourse with the enemy? See the remarks of Lord Atkinson in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[9] The fact that there were persons in Germany who could have carried out the obligations behind the line of war has no bearing on the matter. A territorial enemy in wartime cannot be the agent of a British subject: see *per* Lord Atkinson and Lord Porter in *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co.* (*Gt.*

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[6] [1925] A.C. 495, 505.

[7] [1929] A.C. 1; 44 T.L.R. 747.

[8] [1950] A.C. 186; 66 T.L.R. (Pt. 1) 441; [1950] 1 All E.R. 405.

[9] [1918] A.C. 260, 296.

Britain) Ld.[10] and the remarks of Lord Porter in *Sovfracht (V. O.)* v. *Van Udens Scheepvaart en Agentur Maatschappij.*[11] If the company is in England, any agency agreement between it and its directors in Germany came to an end on the outbreak of war. The contract necessarily involved intercourse with the enemy, and it is clear that the carrying out of the obligations would also have benefited the enemy since its object was to relieve the first defendant, who ultimately became an enemy, from his obligations at the expense of an English company. If such an agreement were not abrogated the absurd situation could arise where an English court might enforce an agreement or give damages for breach of an agreement to supply an enemy company with the sinews of war. If an ordinary English company had been a party to this agreement there is no doubt that it would have been abrogated by war. The defendants' case involves the proposition that a special immunity is given by our trading with the enemy law to British companies of enemy character to enforce contracts which an ordinary English company could not enforce. That would mean applying the *Daimler* case [12] in reverse. If it did run in reverse absurdities would follow. That case places a procedural disability on an English company. It does not give privileges to companies with an enemy character. An English company may acquire enemy character but it does not cease to be an English company: *The Unitas.*[13]

The agreement is also illegal by virtue of the Trading with the Enemy Act, 1939. "Any person" in section 1 of that Act includes a company registered in England, and the performance of this agreement would involve the defendant company in doing a number of prohibited acts. The question is whether an English company of enemy character is any less "any person" within the meaning of the words of the section.

[McNAIR J. I am prepared to accept, until persuaded to the contrary, that the words "any person" in section 1 include any company registered in the United Kingdom wherever it is managed or controlled or carries on its business.]

It is submitted that the statute applies to acts done in enemy territory by "persons" within the meaning of the section resident in enemy territory. Whether or not a statute is to be construed as having extra-territorial effect depends on the mischief that Parliament intended to deal with: *Weld* v. *Fruhling and Goschen*,[14] and the observations of Lord Russell in *Reg.* v. *Jameson*.[15] On those authorities it cannot be suggested that so long as the mischief takes place outside the jurisdiction of the English courts the legislature was not intending to prohibit it. Failure to give extra-territorial effect to the Act would stultify its purpose, and it is therefore submitted that anyone with a foothold in this country is within the prohibitions of the Act and cannot evade it by doing prohibited acts outside this country. In those circumstances, the 1939 agreement was abrogated or frustrated both by common law and statute.

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[10] [1916] 2 A.C. 307, 325, 336; 32 T.L.R. 624.

[11] [1943] A.C. 203, 254; 59 T.L.R. 101.

[12] [1916] 2 A.C. 307.

[13] [1948] P. 205.

For the same reasons the 1940 agreement was illegal by virtue of the Trading with the Enemy Act. Further, although it was entered into by a person purporting to act on behalf of the defendant company, that person had no authority to bind the company as his authority had been terminated on the outbreak of war when he became a territorial enemy. That follows from the general statement of Lord Parker in *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co.* (*Gt. Britain*) *Ld.*[16] In those circumstances there never was an agreement made in 1940 and as the 1939 agreement was abrogated and became illegal by statute the plaintiff is entitled to pursue his remedies against the defendants on the basis of the 1929 agreement.

B. J. McKenna Q.C. and *James Fawcett* for the defendants. The plaintiff admits that he was not an enemy alien at the time when the 1939 agreement was made or in 1940 or 1941 when performance would have taken place under it. Therefore this was not an agreement between an Englishman in England and a German in Germany but, at the worst, an agreement between an Englishman in England and a Hungarian in Hungary. Assuming, contrary to our main submission, that the company is to be regarded as resident in England, the test is, could the agreement be performed without intercourse with the enemy? It is submitted that it could. The agreement does not make payment to the plaintiff in Germany obligatory; that part of it could have been performed by a payment to him in Hungary, and the mere possibility that he might give instructions to pay a creditor in

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[14] (1916) 32 T.L.R. 469.

[15] [1896] 2 Q.B. 425, 430; 12 T.L.R. 550.

[16] [1916] 2 A.C. 307, 336.

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Germany does not render the whole agreement void as infringing public policy. The court will not say that the agreement must be abrogated immediately war breaks out.

[McNair J. referred to *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[17]]

That case laid down the rule that a contract between a British subject and an enemy alien is abrogated on the outbreak of war if it infringes the trading with the enemy law. The same rule applies to a contract between a British subject and a neutral: *Esposito* v. *Bowden*.[18] It is to be observed that in *Esposito* v. *Bowden*[18] the contract was indivisible, but there may be cases where a contract is severable, and in such cases if part of the contract cannot be performed because of illegality at common law or by statute while part can be lawfully performed, the court will sever the unlawful part from the lawful part: *Putsman* v. *Taylor*.[19] None of the authorities cited here held that severance cannot be made in a case where the parties to a contract are two British subjects or a British subject and a neutral. If there be a contract requiring a number of things to be done, and one thing, to take an extreme example, involves intercourse with the enemy, there is no principle preventing the court from severing it. If there are two ways of performing a contract, one legal and the other illegal, the contract is not rendered bad because of the possibility of it being illegally performed: see Halsbury's Laws of England, 2nd ed., vol. 8, p. 190. The 1939 agreement, which provided for payment to the plaintiff in Germany, could also be performed by payment outside Germany, and if payment to the plaintiff was the substantial obligation under the agreement it is immaterial that other obligations, such as the application to the German Exchange Control and the litigation at Beuthen, could not be performed without infringing the trading with the enemy law: they must be regarded as discharged for impossibility of performance. The court must ascertain whether the agreement cannot in substance be performed without infringement of English law.

[McNair J. I agree that there are cases in contract where the court may strike out clauses in an agreement, but I have never known the principle of severance to be applied to a contract subject to the trading with the enemy law so as to save the contract from abrogation.

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[17] [1918] A.C. 260.

[18] (1857) 7 E. & B. 763.

[19] [1927] 1 K.B. 741; 43 T.L.R. 153.

Assuming that the defendant company is to be treated as a person resident in England and that the performance of the 1939 agreement would require intercourse with the enemy, it is submitted that, on the principle of *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag*,[20] it would not have been abrogated on the outbreak of war though it might have been suspended. If the agreement had not been made the 1929 agreement would still have been effective. Under that agreement the plaintiff had an accrued right to receive liquidated sums of money from the first defendant, the defendant company being the guarantor. The 1939 agreement was merely a method of discharge of the plaintiff's subsisting rights under the 1929 agreement and, therefore, whether it was conditional or unconditional, it would have been suspended and not abrogated. There is nothing in English public policy requiring an agreement compromising a surety's liability to be abrogated on the outbreak of war. It stands in the same position as the original contract. Terms which require suspension because they infringe public policy will be suspended: see the judgment of Lord Greene M.R. in *Schering Ld.* v. *Stockholms Enskilda Bank*,[21] and the judgments of Lord Thankerton,[22] Lord Porter[23] and Lord Goddard.[24] [Reference was also made to *Ottoman Bank* v. *Jebara*.[25]]

On the facts of this case the defendant company was of enemy character and ought to be treated as a person resident in Germany. The test of enemy character is residence, and in considering the residence of a company the determining factor is the place of its commercial domicile: see the tests laid down by Lord Simon and Lord Wright in *Sovfracht (V. O.)* v. *Van Udens Scheepvaart en Agentur Maatschappij*.[26] That case shows that the trading with the enemy law is concerned with transactions which cross the line of war and not with those conducted on one side or the other. *Houriet* v. *Morris*[27] and *Antoine* v. *Morshead*[28] support that proposition.

[McNair J. referred to *Willison* v. *Patteson*,[29] where Gibbs C.J. stated that *Antoine* v. *Morshead*[30] was an exceptional case which did not come within the general rule, and to McNair, Legal Effects of War, 3rd ed., p. 118.]

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[20] [1946] A.C. 219; [1946] 1 All E.R. 136.
[21] [1944] Ch. 13, 19.
[22] [1946] A.C. 219, 233.
[23] Ibid. 258.
[24] Ibid. 267.
[25] [1928] A.C. 269.
[26] [1943] A.C. 203, 211, 219.
[27] (1812) 3 Camp. 303.
[28] (1815) 6 Taunt. 237.
[29] (1817) 7 Taunt. 439.
[30] 6 Taunt. 237.

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There is no general rule that the English courts will not enforce contracts made in enemy territory. [Reference was made to Williston on Contracts, 1931 ed., vol. III, p. 3050, section 1747, and *Conrad* v. *Waples*.[31]]

Ottoman Bank v. *Jebara*[32] shows that there is nothing in common law or statute to prevent an enemy company trading with an enemy. If, therefore, the company, for the purpose of trading with the enemy, is to be considered as having the same status as any other person resident in Germany, there could be no infringement of the trading with the enemy law in carrying out the agreement. It is submitted that the company ought to be so regarded as it satisfied the test of residence laid down by Lord Simon and Lord Wright in *Sovfracht (V. O.)* v. *Van Udens Scheepvaart en Agentur Maatschappij*.[33] The fact that it was registered in England and held some shares in another English company does not affect the position.

[McNair J. As to those tests, Lord Simon was considering the position of the party with whom a British subject may not contract. I do not feel that the passages relied upon are relevant to determine whether this admittedly English company ceased to be an English company. It may have acquired enemy character.]

The tests appear to be of universal application and ought to be applied unless there is some good reason to the contrary. If the present case is to be an exception to the general principle there laid down, the principle on which the exception is made ought to be shown. In that connexion *Daimler Co. Ld.* v. *British Continental Tyre and Rubber Co. (Gt. Britain) Ld.*[34] is important.

[McNair J. This whole argument is an attempt to apply the *Daimler* case[34] in reverse. You are submitting that an English company, so long as it does nothing in this country, can safely do what is prohibited to persons in this country by the trading with the enemy law.]

The general test is residence. A neutral subject who resides in enemy territory and carries on business there is to be treated as an enemy. If a natural-born British subject is living in enemy territory and carrying on business there his commercial dealings ought not to be invalidated by the trading with the enemy laws. Similarly with a company. If no real reason can be given why an English company should not be treated as an enemy while it resides and carries on business in an enemy country, a strong case is made out for applying the *Daimler* case [34] in reverse, although the court is not bound to do so. There is no authority on the point. [Reference was made to *In re Hilckes.*[35]] The decision of the Court of Appeal in *Elders & Fyffes* v. *Hamburg Amerikanische Packetfahrt Actien Gesellschaft* [36] affords no support for the view that the *Daimler* case [37] does not run in reverse.

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[31] (1877) 96 U.S. 279.

[32] [1928] A.C. 269.

[33] [1943] A.C. 203.

[34] [1916] 2 A.C. 307.

[McNAIR J. In that case Bray J.[38] took the view that a company, though it had an enemy character, might still be an English company, and Swinfen Eady L.J.[39] said that he agreed entirely with that.]

In his reasons Swinfen-Eady L.J. distinguished the *Daimler* case [40] on its facts. *Swedish Central Railway Co.* v. *Thompson,*[41] on which the plaintiff also relied, only decided that a company could have two residences. That was dealt with in *Egyptian Delta Land and Investment Co. Ld.* v. *Todd,*[42] where it was held that for income tax purposes the residence of a company, whether British or foreign, was preponderantly if not exclusively determined by the place where its real business was carried on. In *Gasque* v. *Inland Revenue Commissioners* [43] the court drew a distinction between domicile and residence.

The agreement was not illegal by statute. There is a presumption in construing a statute that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares. The general words of an Act are not to be so construed as to alter the previous policy of the law: Maxwell on Interpretation of Statutes, 9th ed., pp. 85, 86. The Trading with the Enemy Act, 1939, did not make it an offence for a company resident in Germany to trade with the enemy, because there is no express provision to that effect. The only contrary indication to be found is in the words " any person " in section 1 of the Act. It is submitted that the Act was not intended to control the activities of British subjects outside the United Kingdom: see section 14, which indicates that the Act has merely a territorial ambit. The company was not " any person " within the meaning of section 1. *Weld* v. *Fruhling and Goschen* [44] is distinguishable. It is plain that section 6 (2) of the Trading with the Enemy Act, 1914, was intended to cover transfers of bills made anywhere in the world, so that it covered a case where there had been a transfer of a bill of indorsement to a neutral in a foreign country.

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[34] [1916] 2 A.C. 307.
[35] [1917] 1 K.B. 48; 33 T.L.R. 28.
[36] (1918) 34 T.L.R. 275.
[37] [1916] 2 A.C. 307.
[38] (1917) 34 T.L.R. 4.
[39] 34 T.L.R. 275.
[40] [1916] 2 A.C. 307.
[41] [1925] A.C. 495.
[42] [1929] A.C. 1.
[43] [1940] 2 K.B. 80.
[44] 32 T.L.R. 469.

As to the 1940 agreement, if the company is to be regarded as resident in Germany there is no doubt that it was effective. The plaintiff's argument that the person who entered into it on behalf of the company was not authorized so to do can only avail if it be held that the company was resident in England. If that be held, then it is submitted that the defendant company adopted the transaction and thereby ratified it.

Finally, it is submitted that under German law, which is the proper law of the 1929 agreement, a plaintiff is not permitted to enforce a legal right against a defendant if by reason of the plaintiff's conduct since acquiring the right it would be inequitable for him to exercise it. That applies in the present case, for the plaintiff accepted money under the 1940 agreement in the belief that it was a good agreement. He cannot now claim rights under the 1929 agreement.

Caplan Q.C. in reply. There is nothing, apart from the statements obiter in *Sovfracht (V. O.)* v. *Van Udens Scheepvaart en Agentur Maatschappij*,[45] which supports the proposition that the *Daimler* case[46] can be applied in reverse, and it cannot have been intended to introduce a new principle into English law by way of obiter. In any event, in that case Lord Simon was dealing with who was an enemy for the purpose of the criminal offence of trading with the enemy, which has nothing to do with the question whether a company of enemy character is subject to the prohibitions which apply to an English company. On the facts of the present case the *Daimler*[46] principle could not operate in reverse, and therefore the words of Lord Parker could have no application. It was decided in *The Unitas*[47] that the *Daimler* case[46] could not run in reverse.

As to the defendants' argument on severability, that can only apply if a contract involving illegality contains something completely separate and independent. If all the matters are bound up with the whole of the contract then, on the authorities, there cannot be severance. The whole of this complicated contract hangs together, and therefore no part of it can be severed. Moreover, the doctrine of severability has no place in the law relating to the abrogation of executory contracts: *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[48] [Reference was also made to *Bennett* v. *Bennett*[49] and *Denny Mott and Dickson Ld.* v. *James B. Fraser & Co. Ld.*[50]]

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[45] [1943] A.C. 203.

[46] [1916] 2 A.C. 307.

[47] [1948] P. 205.

The theory of suspension put forward by the defendants is based solely on *Schering & Co. Ld.* v. *Stockholms Enskilda Bank*,[51] but that case is exceptional. It lays down no general principle and it has not altered the law as laid down in *Ertel Bieber & Co. Ld.* v. *Rio Tinto Co. Ld.*[52] that all executory contracts must be abrogated if they involve intercourse with the enemy.

As to the position of the defendant company under the Trading with the Enemy Act, there is no authority for the proposition that any registered English company can be excluded except expressly from the meaning of the word "person" in section 1 of the Act. *Reg.* v. *Zulueta*[53] and *Reg.* v. *Jameson*[54] support the proposition that the Act applies to all acts done by "persons" within the meaning of the Act even if done outside the jurisdiction.

Cur. adv. vult.

December 3. McNAIR J. stated the facts and said: I accept the submission made on behalf of the plaintiff that the effect of clause 15 is that the agreement of 1939 as a whole is subject to these two conditions precedent, and at the lowest that the obligation to pay is subject to the further conditions precedent that the Exchange Control Office shall have ratified the settlement and that the plaintiff shall have communicated that the two former conditions had been fulfilled. I note, without expressing any final opinion, the further contention that the ratification of the Exchange Control Office must be a continuing ratification in force at the time of the fulfilment of the two conditions expressed in clause 15. In my judgment the facts narrated above lead to the clear conclusion that (quite apart from the effect of the English law as to trading with the enemy) the conditions precedent to the validity of the 1939 agreement were never fulfilled, and accordingly it never came into effect. Accordingly, I answer issue 1 (*b*) in the negative, quite apart from the effect of the English law as to trading with the enemy.

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[48] [1918] A.C. 260.

[49] [1952] 1 K.B. 249; [1952] 1 All E.R. 413; [1952] 1 T.L.R. 400.

[50] [1944] A.C. 265; 60 T.L.R. 419.

[51] [1946] A.C. 219.

[52] [1918] A.C. 260.

[53] (1843) 1 Car. & Kir. 215.

[54] [1896] 2 Q.B. 425.

His Lordship continued: On behalf of the plaintiff it was submitted that on the outbreak of war between Great Britain and Germany on September 3, 1939, the 1939 agreement (even if, contrary to his contention, it ever came into effect) was abrogated, as it was of an executory character, and (i) involved either intercourse with persons in Germany or benefit to such persons, or (ii) provided means of communication with such persons.

It was further submitted that the 1940 agreement could not be regarded in English law as being the agreement of the defendant company so as to bind them, nor could any payments made either under the 1939 agreement, if there were any, or the 1940 agreement by any persons purporting to act on behalf of the defendant company, be taken in English law to be payments by the company, since on or by reason of the outbreak of war all persons in Germany who before the outbreak of war were directors of or agents of the defendant company ceased to have any authority to act for the company. In addition, it was submitted that the 1940 agreement, if ever made, was abrogated on the same grounds as were advanced for the abrogation of the 1939 agreement.

To these submissions the broad answers made by the defendants may be summarized as follows: (*a*) On the facts of this case the defendant company, though incorporated and registered in England, is to be treated as a person in Germany and not in England, with the result that no intercourse, benefit or communication took place or was required to take place across the line of war, and the authority of the defendant company's directors and agents was not terminated. (*b*) If (contrary to their submission under (*a*)) the defendant company is to be treated as a natural person resident in England, then on the true construction of the 1939 agreement (i) there were no terms which necessitated intercourse with, benefit to or communication with persons in Germany, and (ii) if there were any such terms, the terms in question were not essential to the validity of the agreement and could be severed, leaving the remainder unaffected. It was further argued that if on the hypothesis stated the agency of the defendant company's directors and agents was terminated, the defendant company ratified the 1940 agreement (which they were entitled to do since its terms or its essential terms, like the 1939 agreement, did not involve prohibited intercourse, benefit or communication) and adopted the payments made thereunder. I am conscious that in that summary I may not have given full effect to the detailed arguments which were presented to me, but that, in outline, is how I understand the contentions.

I propose first to deal with the contention that the defendant company is to be treated as a person resident in Germany and not in England. [His Lordship then summarized the facts as to the incorporation and pre-war activities of the company as set out above, and continued:] On these facts I find that the defendant company was, in the eyes of English law, a company having enemy character on the principles laid down in *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co. (Great Britain) Ld.*[1] On this state of facts and finding it was argued by counsel on behalf of the defendants that for the purposes of the common law prohibition against trading with the enemy the company must be treated as being in Germany and not in England. In support of this argument reliance was primarily placed upon two passages in the opinions of Lord Simon and Lord Wright in *Sovfracht (V. O.)* v. *Van Udens Scheepvaart en Agentur Maatschappij.*[2]

Lord Simon laid down the following propositions[3]: "1. The "test of 'enemy character' is fundamentally the same whether "the question arises over a claim to sue in our courts, or over "issues raised in a court of prize, or over a charge of trading with "the enemy at common law. 2. The test is an objective test, "turning on the relation of the enemy Power to the territory "where the individual voluntarily resides or the company is "commercially domiciled or controlled. It is not a question of "nationality or of patriotic sentiment." Lord Wright is reported as having said[4]: "Before examining the relevant authorities I "should explain that the test which has been taken of enemy "character in English law is not nationality but domicile in the "sense of settled residence or in the case of traders commercial "domicile. . . . However, the right to sue or prosecute an action "in court, the right to claim to be exempt from seizure and "condemnation in prize, the liability to punishment for the "offence of trading with the enemy, all depend alike on whether "the person has enemy character in what has been called the "technical or territorial sense." In parenthesis I should observe that in this passage Lord Wright is clearly (as was Lord Simon expressly) dealing with the position at common law, since by section 2 of the Trading with the Enemy Act, 1939, "enemy" is expressly defined to mean, inter alia, "(*d*) any body of persons "constituted or incorporated in, or under the laws of, a State at "war with His Majesty."

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[1] [1916] 2 A.C. 307; 32 T.L.R. 624.

[2] [1943] A.C. 203; 59 T.L.R. 101; [1943] 1 All E.R. 76.

[3] [1943] A.C. 203, 211.

[4] Ibid. 219.

In my judgment it is clear that Lord Simon and Lord Wright in these passages, so far as they deal with the law as to trading with the enemy, are propounding the test to be applied in determining whether such a company is a person with whom a person subject to English law may without offence trade. They are merely restating in their own words the third proposition propounded in Lord Parker's opinion in the *Daimler* case [5] in the following passage: "(3) Such a company"—that is a company incorporated in the United Kingdom—"may, however, assume "an enemy character. This will be the case if its agents or "persons in de facto control of its affairs, whether authorized or "not, are resident in an enemy country, or, wherever resident, "are adhering to the enemy or taking instructions from or acting "under the control of enemies. A person knowingly dealing with "the company in such a case is trading with the enemy." I emphasize the last sentence.

Neither of these passages in Lord Simon's [6] or Lord Wright's [7] speeches is dealing with the question which I have to deal with, namely, whether an English company found to have enemy character by reason of enemy control ceases to be in the eye of the English law an English company and subject to the prohibition which English law imposes on persons subject to that law. On this question there is, so far as I know, no direct authority, but such authority as there is in my judgment strongly suggests a negative answer. In *Elders & Fyffes Ld.* v. *Hamburg Amerikanische Packetfahrt Actien Gesellschaft* [8] Bray J.[9] made the following comment upon Lord Parker's opinion to which I have just referred, namely, that "Lord Parker only decided that by certain "conduct an English company might become an enemy company. "He did not say that it would thereby cease to be an English "company." With this judgment Swinfen-Eady L.J.[10] expressed his entire agreement, though his judgment proceeded upon different findings of fact from those adopted by Bray J. In *The Unitas* [11] Lord Merriman P.[12] declined to apply the principle of

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[5] [1916] 2 A.C. 307, 345.

[6] [1943] A.C. 203, 211.

[7] Ibid. 219.

[8] (1917) 34 T.L.R. 4.

[9] Ibid.

[10] (1918) 34 T.L.R. 275.

[11] [1948] P. 205; [1948] 1 All E.R. 421.

[12] [1948] P. 205; [1948] 1 All E.R. 421, 432.

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the *Daimler* case [13] in reverse in favour of a claimant in prize so as to convert a German registered company into an allied company by reason of its control from Holland. Further, I am aware of nothing in Lord Parker's formulation [14] of the *Daimler* case or in any later application of that test which involves the conclusion that the acquisition of enemy character by a corporation implies the loss of the national character of that corporation. Enemy character is not substituted for the original character, but is something added to it. An English company which has acquired enemy character continues to owe its very existence to English law (under which it was incorporated) and remains subject to all its obligations towards the Crown under the Companies Acts as an English company. It would, in my judgment, be absurd that the acquisition of enemy character should release it from the obligations attaching to an English company and enable it to do lawfully things which an English company not possessing enemy character was lawfully unable to do.

I can derive little, if any, assistance in the solution of the problem which I have to solve from cases dealing with the residence of English companies for the purpose of income tax, such as *Swedish Central Railway Co. Ld.* v. *Thompson*,[15] and *Egyptian Delta Land and Investment Co. Ld.* v. *Todd*,[16] but the decision of MacNaghten J. in *Gasque* v. *Inland Revenue Commissioners* [17] supports the conclusion that the domicile of a limited company (which is of particular relevance here) is the place of its registration and that this domicile clings to it throughout its existence. This, apparently, is also the position under American law: *Bergner and Engel Brewing Co.* v. *Dreyfus* [18] (a decision of Holmes J.) referred to in the judgment of MacNaghten J.[19] See, too, Dicey's Conflict of Laws, 6th ed., r. 18: "The domicile of a "corporation is the country in which it is registered. If it is not "required in law to be registered, its domicile is in the country by "the law of which it is incorporated." I think that it is also clear that, in so far as nationality can by analogy be applied to a juristic person, its nationality is determined in an inalienable manner by the laws of the country from which it derives its personality: see *Janson* v. *Driefontein Consolidated Gold Mines Ld.*,[20] *per* Lord

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[13] [1916] 2 A.C. 307.

[14] Ibid. 345.

[15] [1925] A.C. 495; 41 T.L.R. 385.

[16] [1929] A.C. 1; 44 T.L.R. 747.

[17] [1940] 2 K.B. 80; 56 T.L.R. 683.

[18] (1898) 70 Am.St.Rep. 251.

[19] [1940] 2 K.B. 80.

[20] [1902] A.C. 484, 505; 18 T.L.R. 796.

Lindley; *Gasque* v. *Inland Revenue Commissioners* [21]; Halsbury's Laws of England, 3rd ed., vol. 9, p. 19.

In my judgment it would be contrary to principle and to public policy as embodied in the trading with the enemy law to hold that a company incorporated under the laws of this country and registered here, and so having both an English domicile and British nationality, can cease to be in the eye of English law an English company subject to English law by reason of the fact of enemy control. Enemy control may operate to the prejudice of an English company by conferring upon it enemy character, but cannot confer benefit upon it exonerating it from the operation of English law. Could it be said that this English registered company could lawfully by English law, merely because it had acquired enemy character by means of enemy control, have, during the war, entered into contractual relations to supply a German armament firm with coal from its Beuthen mines, or that it could after the war ask the English courts to give effect to such a contract? Plainly not.

It follows from the conclusion stated above, first, that as a company can only act through directors or other agents, the authority of the defendant company's directors and other agents in enemy territory was automatically determined on the outbreak of war: see *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co. (Great Britain) Ld.*,[22] *per* Lord Atkinson,[23] Lord Shaw [24] and Lord Parker.[25] From this it results that in English law (1) no act purported to have been performed in Germany on behalf of the company can be taken to be the act of the company, and (2) no agreement made by persons in Germany purporting to act on behalf of the company can be taken to be the agreement of the company. Without doubt, therefore, the 1940 agreement is not to be taken as the agreement of the company.

It remains for consideration what effect, if any, the conclusion stated above has upon the fate of the 1939 agreement. It is conceded, or, if not conceded, is in my judgment clear in principle, that in so far as the 1939 agreement was executory on the outbreak of war it would be abrogated at least if its performance necessarily involved intercourse or communication across the line of war or benefit to the enemy. To state the proposition in this form is probably to state it too favourably for the defendants, since in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[26] Lord Dunedin states the proposition in the following terms[27]: "From these "cases I draw the conclusion that upon the ground of public policy "the continued existence of contractual relation between subjects "and alien enemies or persons voluntarily residing in enemy "country which (1) gives opportunities for the conveyance of "information which may hurt the conduct of the war, or (2) may "tend to increase the resources of the enemy or cripple the "resources of the King's subjects, is obnoxious and prohibited by "our law." I am, however, for present purposes only, prepared to apply the narrower proposition.

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[21] [1940] 2 K.B. 80.

[22] [1916] 2 A.C. 307.

[23] Ibid. 325.

[24] Ibid. 330.

[25] Ibid. 336.

[26] [1918] A.C. 260; 34 T.L.R. 208.

Did, then, the performance of the 1939 agreement (assuming, contrary to my earlier findings, that it ever came into effect) necessarily involve intercourse or communication across the line of war or benefit to the enemy? It was an essential part of the agreement that litigation to resolve the reserved questions should be prosecuted between the company and the plaintiff in the German courts; it was clearly impossible to perform this part of the contract without intercourse: for the company could take no part in such litigation except through its agents, and agency necessarily involves intercourse. Furthermore, (1) clause 1 of the agreement expressly provides for payment by the defendant company of certain fees to the German Receiver in Bankruptcy; (2) the implementation of the agreement would have resulted in the discharge of the first defendant, a person at all material times resident in enemy territory, and (3) the payment by the company's erstwhile agents in Germany of 160,000 reichsmarks would diminish the resources of the English company, quite apart from the fact that it was clearly contemplated that, if not the whole, at least a large part of the 160,000 reichsmarks would be paid to the plaintiff's creditors in Germany. There was necessarily, then, both benefit to the enemy and detriment to the resources of the King's subjects, as well as intercourse and means of communication.

As to the argument advanced that it is possible to sever from the 1939 agreement those provisions which offend from those which are innocent, two answers may properly be made. First, that there is no authority for the proposition that for the purpose of the matter under consideration severance can ever take place and no ground of public policy which requires such severance. The decisions relating to severability of covenants in restraint of trade, such as *Putsman* v. *Taylor*,[28] seem to me to have no application at all in the present context. Secondly, that severance can only take place, if at all, if the part which it is sought to sever stands by itself supported by separate consideration. This is not the case here. The offending provisions to which I have referred are not supported by separate consideration but are inextricably interwoven with the other promises in the agreement.

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[27] [1918] A.C. 260, 274.

[28] [1927] 1 K.B. 637, 741; 43 T.L.R. 153, 392.

A more refined argument was, however, presented by counsel for the defendants upon the basis of the decision in *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag.*[29] This proceeded on the following lines: (1) If no agreement had been entered into in 1939 the obligations of the defendant company as guarantors towards the plaintiff under the 1929 agreement would not on the outbreak of war have been abrogated but would merely have been suspended, since on that assumption the plaintiff would have wholly executed his part and payment of money by instalments alone remained to be performed by the first defendant under the guarantee of the defendant company; (2) the 1939 agreement provided merely a method of discharge of the existing obligation to pay money by instalments and if it had become effective before the outbreak of war it similarly would have been suspended and not abrogated; and (3) it makes no difference that the 1939 agreement only became effective after the outbreak of war.

I have found great difficulty in finding in the *Schering*[29] decision (which, as Lord Porter says,[30] was a very special decision) any support for these propositions or any analogy with the present case. But one essential difference is that the obligation under consideration in the *Schering* case[31] involved no intercourse across the line of war, whereas the resolution of the reserved questions by litigation in the German courts between the English company and the plaintiff would (as has already been noted) necessarily involve intercourse between the English company and their legal advisers acting upon their behalf in that litigation. Furthermore, in my judgment the analysis set out in the three propositions referred to above is not accurate. The 1939 agreement did not merely provide a method of discharging an accrued right; if implemented it would (1) have created a new obligation to pay not gold marks but reichsmarks, (2) have substituted the defendant company for the first defendant as principal debtor and (3) have discharged the first defendant.

Up to this point in my judgment I have considered only the impact of the common law rules as to trading with the enemy, but seeing that the effect of the Trading with the Enemy Act, 1939, was also argued before me, it is right that I should shortly state my conclusions on this aspect of the matter. Having reached the conclusion that the defendant company, though acquiring enemy character, retained English domicile and nationality and did not cease to be in the eye of English law an English company subject to English law, it is clear that it remained subject to all the prohibitions imposed by section 1 of that Act to the same extent as a British subject residing in Great Britain. But even if its position is to be equiparated to that of a British subject voluntarily resident in Germany, I am by no means satisfied that it would be freed from the prohibitions imposed by the Trading with the Enemy Act. Many of the old decisions dating from a more liberal age which suggest that British subjects in enemy territory enjoy a measure of freedom of action in their dealings with the enemy are of doubtful authority today.

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[29] [1946] A.C. 219; [1946] 1 All E.R. 136.

[30] [1946] A.C. 219, 267.

[31] [1946] A.C. 219.

As to the contention that after the end of the war the defendant company ratified the 1940 agreement and adopted the payments made thereunder, the short answer in my judgment is that no one can ratify an agreement or adopt an act which could not lawfully have been made or done at the time when the agreement was purported to be made or the act to be done on behalf of the person ratifying.

Accordingly, my answers to the issues directed to be tried by the master's order are as follows: 1 (*a*) Yes; 1 (*b*) No; 1 (*c*) was by agreement between counsel withdrawn. My answer to 1 (*b*) being in the negative, 1 (*d*) and (*e*) do not arise; but it was admitted that in view of the disappearance of the Beuthen court the plaintiff is entitled to have the disputed questions determined in the present action; 2 (*a*) No; 2 (*b*) Yes; 2 (*c*) by agreement was withdrawn; and 2 (*d*) and (*e*) must be answered as in 1 (*d*) and (*e*) above.

[His Lordship then considered a third question which by agreement was added at the trial, namely, whether either or both defendants had a defence to the claims of the plaintiff in the present action excluding claims which arose on the "reserved "questions." He found that (*a*) at all material times the persons in de facto control of the affairs of the defendant company in Germany did believe that the 1940 agreement was binding upon the parties and that the plaintiff acted in a manner which showed that he knew that they so believed; (*b*) acting on this belief the persons in de facto control of the affairs of the defendant company in Germany paid to the plaintiff or others on his instructions the sum of 160,000 reichsmarks under the 1940 agreement. He held that the 1924 and 1929 agreements and the guarantee of the defendant company were all governed by German law but, taking the view that the 1940 agreement was not in law to be taken as the agreement of the defendant company, he held that no action by the defendant company by way of ratification or adoption could in English law have any effect. Having considered the issues of German law arising on his findings his Lordship held that the 1940 agreement was not invalid by German law, its invalidity flowing from English public policy, and that therefore the doctrine of venire contra factum proprium could not apply to debar the plaintiff from asserting the invalidity of the agreements in the German courts. He held further that to allow the operation of that doctrine to prevent the English courts from holding that the 1940 agreement was invalid would in effect be to prevent the English court from giving effect to English public policy which declared the 1940 agreement to be invalid and that that consideration was also fatal to arguments advanced by counsel based on the principle of English law of approbation and reprobation, or estoppel, whether legal or equitable. He therefore concluded that the plaintiff was not debarred by the matters raised on the preliminary issues from pressing his remedies against the defendants.]

Judgment for the plaintiff.

Solicitors: *Crawley & de Reya; Slaughter & May.*

E. M. W.

1954
Nov. 29;
Dec. 13.

REGINA *v.* GOVERNOR OF BRIXTON PRISON.

Ex parte KOLCZYNSKI AND OTHERS.

Lord Goddard C.J., Cassels and Devlin JJ.

Extradition—Offence of a political character—Jurisdiction of magistrate—Jurisdiction to review decision of magistrate—Offences committed to escape from political tyranny—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *ss.* 3 (1), 9—*Poland (Extradition) Order in Council,* 1934 (*S.R. & O.* 1934, *No.* 209).

In September, 1954, seven Polish nationals who were serving as members of the crew of a small trawler fishing in the North Sea as part of a Polish fishing fleet, decided to seek political asylum in England. In order to accomplish their purpose they overpowered the captain of the vessel and the other members of the crew, only one of whom offered any resistance, and thereupon they brought the ship into an English port where they were placed under arrest.

The Polish Government, pursuant to the terms of a Treaty of Extradition dated January 11, 1932, made between Great Britain and Poland, and the Poland (Extradition) Order in Council, 1934,[1] sought the extradition of the prisoners on the ground that each of them had committed various extraditable crimes.

The magistrate before whom the prisoners appeared accepted as being true evidence showing that while at sea a political officer overheard and recorded the prisoners' conversations with a view to preparing a case against them on account of their political opinions. The magistrate came to the conclusion that the only object the prisoners had in mind in seizing the trawler was to leave their native country in which they suffered an intolerable sense of frustration and repression, and that they achieved their object with the minimum amount of injury to persons and property. He left the question of law whether in those circumstances the prisoners were entitled to the protection afforded by section 3 (1) of the Extradition Act, 1870,[2] to the High Court through the prisoners' application for a writ of habeas corpus:—

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[1] Poland (Extradition) Order in Council, 1934, sets out the terms of the Treaty, including: "Art. 1. The "High Contracting Parties engage to "deliver up to each other . . . those "persons who, being accused or con"victed of any of the crimes or "offences enumerated in Article 3, "committed within the jurisdiction of "the one Party, shall be found within "the territory of the other Party."

"Art. 3. Extradition shall be "reciprocally granted for the follow"ing crimes or offences when they are "punishable in accordance with the "laws of both the High Contracting "Parties. . . . 7. Kidnapping or "false imprisonment. . . . 12. Mali"ciously wounding or inflicting "grievous bodily harm. . . . 25. "Piracy. 26. Wrongfully sinking or "destroying a vessel at sea or "attempting to do so. 27. Assault "on a person on board a ship on the "high seas with intent to inflict death "or do grievous bodily harm. 28. Re"volt, or conspiracy to revolt, by two "or more persons on board a ship on "the high seas, against the authority "of the master. . . ."

"Art. 7. A fugitive criminal shall "not be surrendered if the crime in "respect of which his surrender is "demanded is one of a political "character, or if he proves that the "requisition for his surrender has, in "fact, been made with a view to try "or punish him for a crime or offence "of a political character.

"Art. 8. A person surrendered can "in no case be kept in custody or be "brought to trial in the State to "which the surrender has been made "for any other crime or offence, or on "account of any other matters, than "those for which the extradition shall "have taken place. . . ."

[2] Extradition Act, 1870, s. 2: "Where an arrangement has been "made with any foreign state with "respect to the surrender to such "state of any fugitive criminals, Her "Majesty may, by Order in Council, "direct that such Act shall apply in "the case of such foreign state."

S. 3: "The following restrictions "shall be observed with respect to the "surrender of fugitive criminals: "(1) A fugitive criminal shall not be "surrendered if the offence in respect "of which his surrender is demanded "is one of a political character, or if "he prove to the satisfaction of the "police magistrate or the court "before whom he is brought on "habeas corpus, or to the Secretary

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Held, (1) that the applicants were entitled to the protection afforded by section 3 (1) of the Act of 1870, in that they had proved to the satisfaction of the court that the requisition had in fact been made with a view to trying or punishing them for an offence of a political character;

(2) that it was the duty of a magistrate hearing proceedings brought under the Act to determine upon the whole of the evidence whether or not the offence was of a political character and also whether it was an extraditable crime.

Opinion of Hawkins J. in *In re Castioni* [1891] 1 Q.B. 149, 163; 7 T.L.R. 50, as to duties of magistrates, not followed.

Per Lord Goddard C.J. The true construction of section 3 (1) is that if in proving the facts necessary to obtain extradition the evidence adduced in support shows that the offence has a political character the application for extradition must be refused; but even though the evidence in support appears to disclose merely one of the scheduled offences, the prisoner may show that in fact the offence is of a political character.

APPLICATION for writ of habeas corpus.

In September, 1954, the applicants, seven Polish nationals, were serving as members of the crew of a small trawler fishing in the North Sea as part of a Polish fishing fleet. The captain of the trawler was only in charge of navigation, for the crew were in the charge of an officer known as the political commissar who exercised control over the fleet. On board each of the trawlers was a person known as the party secretary; the political commissar and the party secretaries exercised supervision over

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"of State, that the requisition for "his surrender has in fact been made "with a view to try or punish him "for an offence of a political character. (2) A fugitive criminal shall "not be surrendered to a foreign "state unless provision is made by "the law of that state, or by "arrangement that the fugitive "criminal shall not, until he has "been restored or had an opportunity "of returning to Her Majesty's "dominions, be detained or tried in "that foreign state for any offence "committed prior to his surrender "other than the extradition crime "proved by the facts on which the "surrender is grounded."

S. 9: "When a fugitive criminal "is brought before the police magistrate, the police magistrate shall "hear the case in the same manner, "and have the same jurisdiction and "powers, as near as may be, as if the "prisoner were brought before him "charged with an indictable offence "committed in England.

"The police magistrate shall receive "any evidence which may be tendered "to show that the crime of which the "prisoner is accused or alleged to "have been convicted is an offence of "a political character or is not an "extradition crime."

Sch. I lists among the extradition crimes: "Assaults on board a "ship on the high seas with intent to "destroy life or to do grievous bodily "harm. Revolt or conspiracy to "revolt by two or more persons on "board a ship on the high seas "against the authority of the "master."

the crews' political leanings and it was observed that they noted the conversations of the men.

One of the applicants, a fisherman, by name Kolczynski, had a brother serving in another trawler in the fleet. News came over the wireless of the trawler in which Kolczynski was serving that his brother had escaped to England, and from that moment it was noted that Kolczynski was kept under special observation by the party secretary.

The activities of the party secretary caused the applicants to come to the conclusion that if they remained on the trawler until it returned to Poland they would be dealt with according to the constitution of the Polish People's Republic and the severity of Polish law would be applied to them. They therefore decided to take charge of the trawler and bring her into an English port. In order to accomplish this purpose they barred the door of the water closet where the captain had gone for refuge (it was said without much resistance), they directed an assistant engineer to work the engines, and they put the other members of the crew, about six in number, under restraint. The party secretary showed fight when awakened in his cabin, but he was overpowered, and in the process he was slightly cut on the hand by a fisherman's knife wielded by Kolczynski.

The applicants brought the trawler into Whitby, where they left the ship and asked for political asylum. They were imprisoned.

The Polish Government, pursuant to the terms of a Treaty of Extradition dated January 11, 1932, made between Great Britain and Poland, and the Poland (Extradition) Order in Council, 1934, which directed that the Extradition Act, 1870,[2] should apply in the case of the Republic of Poland, sought the extradition of the prisoners, alleging the commission by each of them of the following offences: use of force; depriving his superiors and other members of the crew of their freedom; wounding one member of the crew (the party secretary); damaging the trawler's wireless installation; and preventing the captain of the trawler from directing her, thus exposing the vessel to the danger of calamity at sea and the entire crew to a loss of life.

The application came before the chief metropolitan magistrate at Bow Street on November 3, 10 and 23, 1954, when the following points emerged from the evidence: Between 1945 and 1947 Poland became a police state ruled by terrorism. The

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[2] See note on p. 541.

Communist Party became the only party in the State with complete control with the help of the security police. Persons opposed to the communist régime were arrested and some disappeared; and it was an offence to leave the country without permission. Ninety per cent. of the population was opposed to the communist régime. Political agents spied on the people and made reports. England was regarded as an enemy country, and to go to a western country without permission was treason.

On November 24, 1954, the magistrate, after considering the evidence, came to the conclusion that the only object which the applicants had in mind was to leave their native country in which they suffered an intolerable sense of frustration and repression and to seek a fresh life somewhere else, and that they achieved their object with the smallest amount of injury to persons and property. He left the declaration of the law to the High Court through the prisoners' application for a writ of habeas corpus.

Sir Hartley Shawcross Q.C. and *W. Glanville Brown* for the applicants. This was probably the politest revolt in history. The applicants used the minimum of force to achieve their ends, and on the facts they are plainly entitled to the protection afforded by section 3 (1) of the Extradition Act, 1870. The authorities which are relevant in considering this question were decided in the nineteenth century when the political climate was very different from that prevailing at the present time; the political philosophy of the day was that of John Stuart Mill. They are analogous to the cases on public policy, in that by their very nature they must depend on the circumstances of the time when they come before the courts; definitions cannot be laid down which will stand for all time. *In re Castioni*[3] and *In re Meunier*[4] appear to proceed on the assumption that for an act to constitute a political crime it must have been done in furtherance of a conflict between different parties contending for power in a state. It is a misconception to suppose that what was laid down in those decisions was meant to be a rule of law exhaustive for all occasions.

The evidence is that at the present time there is no active political opposition to the Communist Party in Poland. If *In re Castioni*[5] and *In re Meunier*[6] were applied rigidly to the facts of the present case the surprising consequence would be that it would be held that the actions of the applicants in seizing the ship and seeking asylum in Britain were not of a political character and that, therefore, they would have to be extradited to Poland, where they would be tried for what in that country is regarded as treason, namely, going to a Western country without permission.

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[3] [1891] 1 Q.B. 149.
[4] [1894] 2 Q.B. 415.
[5] [1891] 1 Q.B. 149.
[6] [1894] 2 Q.B. 415.

If the court were concerned solely with the construction of the first limb of section 3 (1) of the Act of 1870, it might not be sufficient to say that in Poland the actions of these men would be regarded as an offence of a political character, but that is all that the second limb of the subsection is concerned with, and it is plain on the evidence that the reason for the request by the Polish Government for the return of the applicants to Poland is so that they can there be tried and punished for a political offence.

The present case is *In re Castioni* [7] on a smaller scale. As in that case, so here there was a political unit, albeit it consisted of only some 15 persons—the master and crew of the ship. There was a rebellion against the political head of that political unit. The actions of the applicants were done in furtherance of opposition to tyrannical government. They rebelled against their political officer who symbolized the Polish Government. The Polish Government itself, by the letters which it has allowed relatives of the applicants to write to them, has shown the political nature and the light in which the acts of the applicants are regarded in Poland.

The case for the applicants may be summarized thus: "(1) "When we were on board this ship we thought that if we had "returned to Poland in her we would all have been punished for "political unreliability. (2) We chose to escape by the only means "open to us, and the revolt was incidental to the escape. (3) If "we are now sent back to Poland we shall be punished for what is "called 'treason to the party.'" On that evidence it is submitted: (1) the revolt itself was of a political character—rebellion against the political head of the ship and rebellion by the only means open to the applicants. Accordingly, their acts fall within the first limb of section 3 (1) of the Act. (2) Alternatively, whether or not the acts of the applicants are or are not considered in this country as having a political character, in the event of their being sent back to Poland they will there be punished on the basis that what they did had a political complexion. This brings their case within the ambit of the second limb of section 3 (1) and, accordingly, in any event they are entitled to the protection afforded by that section.

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[7] [1891] 1 Q.B. 149.

Sir Reginald Manningham-Buller Q.C., A.-G., and *Maxwell Turner* for the Governor of Brixton Prison. It is the proud tradition of this country that we are willing to offer asylum where a person's life is in danger because of his race, religion, nationality or political opinions. That proud tradition would be defeated if we were bound to surrender a refugee if, in order to obtain asylum, he had committed an extraditable offence. That could not have been the intention of the Act. All these men were imbued with the fear of what would happen to them if they returned to Poland. That fear governed their actions. The present application involves the construction of section 3 (1) of the Act of 1870. *In re Arton*[8] is the only decision in which the second limb of section 3 (1) has been considered. [Reference was made to Piggott, Extradition, A Treatise on the Law Relating to Fugitive Criminals, 1910, pp. 47–49.]

The phrase "offences of a political character" is to be found in sections 3 (1), 7 and 9 of the Act. It would be difficult to give a meaning to that expression which would not be open to strong objection, which went beyond the definition in *In re Castioni.*[9]

It would be of assistance if the court would rule on the correctness or otherwise of the opinion of Hawkins J. in *In re Castioni*[10] as to the extent of the jurisdiction of a magistrate hearing proceedings brought under the Act. [Reference was also made to sections 10, 11 and 12 of the Act, and to Piggott on Extradition, 1910, p. 101.]

Sir Hartley Shawcross Q.C. replied.

LORD GODDARD C.J., on the conclusion of the argument and after a short recess, said that the court would order the writs to issue and on their return the prisoners would be discharged. That was to say that they would not be surrendered to the applying Power, but the order was subject to the prisoners' liability to be detained under the Aliens Act, as persons entering the country without permission, until the decision of the Secretary of State was made known. The court would give its reasons at a later date as the point was of considerable importance.

Cur. adv. vult.

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[8] [1896] 1 Q.B. 108, 110, 113.

[9] [1891] 1 Q.B. 149.

[10] Ibid. 163.

1954, December 13. LORD GODDARD C.J. I will ask Cassels J. to read the first judgment.

CASSELS J. The court has already directed the writ of habeas corpus to issue in each of these seven cases. That meant that these seven men were entitled to release, and they have been released, from custody in these extradition proceedings. They have also been given permission by the Secretary of State to stay in this country.

[His Lordship stated the facts as set out above and continued:] The Extradition Act, 1870, s. 3 (1), states that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character or if he prove to the satisfaction of the police magistrate or of the court before whom he is brought on habeas corpus, or of the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character. The treaty between this country and Poland makes a similar provision.

According to paragraph 2 of article 79, chapter 7, entitled "Citizens' Rights and Duties," of the Constitution of the Polish People's Republic voted by the legislature on July 22, 1952, "Treason of the country consists of spying, weakening of the "armed forces; going over to the enemy, being the gravest "crime, will be punished with all the severity of the law." Treason is an offence of a political character, and is not included in the offences mentioned either in the First Schedule to the Act of 1870 or in the treaty, but in both these assaults and revolt or conspiracy to revolt on board a ship are included.

During their imprisonment letters from relatives were handed to all seven men. Some of the men say that they are not genuine letters, that the language used is not the language of the writers, and one of them says that a letter from his brother must have been dictated by a member of the security force. One brother's letter uses the phrase, "I condemn with scorn your action of "having sold yourself to the American Imperialists," and refers to "repaying education and advantages with treason." A family letter talks of the "influence of the Imperialistic propaganda." A brother writes, "You have betrayed your brothers and your "own country." Another brother writes, "You have left your "sisters and brothers in the country and followed the capitalists." A cousin writes, "You are a traitor to the country and a traitor

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"you will remain until your death. You have abandoned and "betrayed your country. You have escaped to our enemies."

There is an indication in the letters that some of the relatives of these men had been removed from their homes in the early days of October, for some of the letters are dated prior to the taking of the evidence of the captain and other witnesses in Poland on October 8 after the trawler had arrived back.

It is submitted on behalf of the men that if they should be extradited they may well only be tried for the offences for which their extradition is requested, but they will be punished as for an offence of a political character, and that offence is treason in going over to the capitalistic enemies. Everything in the case points that way and for that reason I agree that the writ of habeas corpus should issue.

As to the meaning of the phrase "an offence of a political "character," definitions were considered in *In re Castioni.*[1] John Stuart Mill's definition, "Any offence committed in the "course of or furthering civil war, insurrection or political "commotion," was rejected as too narrow, and Stephen J.'s definition in his History of the Criminal Law, in volume II, page 70, "Fugitive criminals are not to be surrendered for "extradition crimes if those crimes were incidental to and "formed part of political disturbances," was preferred.

Hawkins J., who cited this passage with approval, also expressed the view that it was not for the magistrate to decide whether the requisition for the surrender of the fugitive criminal has in fact been made with a view to try or punish him for an offence of a political character, but that under section 9 of the Act of 1870 all he had to do was to hear the case in the same manner and have the same jurisdiction and powers as near as may be as if the prisoner were brought before him charged with an indictable offence committed in England, and merely to receive evidence which might be tendered to show that the crime of which the prisoner was accused was an offence of a political character and not an extradition crime. To interpret that Act in such a way seems to me to ignore the words of section 3 (1): ". . . if he prove to the satisfaction of the police magistrate. . . ."

In the present case the chief magistrate has left the decision to this court, being the court before whom the prisoners are brought on habeas corpus.

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[1] [1891] 1 Q.B. 149; 7 T.L.R. 50.

The words "offence of a political character" must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1891, when *Castioni's* case [2] was decided. It was not then treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress. Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave. In this case the members of the crew of a small trawler engaged in fishing were under political supervision and they revolted by the only means open to them. They committed an offence of a political character, and if they were surrendered there could be no doubt that, while they would be tried for the particular offence mentioned, they would be punished as for a political crime. Thus they have brought themselves within section 3 (1) and made good their claim to have the restrictions referred to observed.

LORD GODDARD C.J. The questions that arise under section 3 (1) of the Extradition Act, 1870, are: (1) whether the offence for which extradition is sought is an offence of a political character, or (2) have the applicants proved to the satisfaction of this court before whom they are brought on habeas corpus that the requisition has in fact been made with a view to trying or punishing them for an offence of a political character.

This section is somewhat obscure, especially when it is remembered that by subsection (2) a criminal is not to be surrendered to a foreign state unless provision is made by the law of that state or by an arrangement, which must mean by treaty, that he shall not be tried by the foreign state for any offence committed prior to his surrender other than that for which the surrender is granted. This arrangement has been made by a treaty signed on January 11, 1932, between His late Majesty King George V and the President of the Republic of Poland and will be found in the Poland (Extradition) Order in Council, No. 209 of 1934. The court must not assume that the foreign state will not observe the terms of the treaty: see *In re Arton*.[3] The second limb of the section cannot, therefore, in my opinion, mean that the court can say that if extradition is sought for crime A we believe that if surrendered he will be tried or punished for crime B. None of the offences in the schedule to

[2] [1891] 1 Q.B. 149.

[3] [1896] 1 Q.B. 108; 12 T.L.R. 131.

1954

Regina v. Governor of Brixton Prison. *Ex parte* Kolczynski.

Lord Goddard C.J.

the Act are prima facie political. The precise meaning of this difficult section has not yet been made the subject of judicial decision and textwriters have found it difficult of explanation, but in my opinion the meaning is this: if in proving the facts necessary to obtain extradition the evidence adduced in support shows that the offence has a political character the application must be refused, but although the evidence in support appears to disclose merely one of the scheduled offences, the prisoner may show that in fact the offence is of a political character. Let me try to illustrate this by taking a charge of murder. The evidence adduced by the requisitioning state shows that the killing was committed in the course of a rebellion. This at once shows the offence to be political; but if the evidence merely shows that the prisoner killed another person by shooting him on a certain day, evidence may be given, and under section 9 the magistrate is bound to receive it, to show that the shooting took place in the course of a rebellion. Then if either the magistrate or the High Court on habeas corpus or the Secretary of State is satisfied by that evidence that the offence is of a political character, surrender is to be refused. In other words, the political character of the offence may emerge either from the evidence in support of the requisition or from the evidence adduced in answer.

The present case, in my opinion, comes within the second limb. Prima facie the evidence in support of the requisition merely shows a revolt by two or more of the persons charged on board a ship on the high seas against the authority of the master, and this is a scheduled offence. The evidence, the truth of which the magistrate accepted, showed that these men while at sea found that a political officer was overhearing and recording their conversations and keeping observation upon them for the purpose of preparing a case against them on account of their political opinions, presumably in order that they might be punished for holding or at least expressing them. A resultant prosecution would thus have been a political prosecution. The revolt of the crew was to prevent themselves being prosecuted for a political offence and in my opinion, therefore, the offence had a political character. I would emphasize that although the requisitioning power is diplomatically represented in this country no attempt was made to controvert or displace the evidence of the applicants or of the witnesses called on their behalf. The Polish Government were not represented before the magistrate or this court and cannot therefore complain if the court accepts the evidence given on this matter by or on behalf of the applicants.

The chief magistrate, while accepting the evidence, thought that as the only decision on what constituted a political offence was that to be found in *In re Castioni*,[4] he was bound to commit and to leave it to this court to say whether that decision was conclusive or whether the words "of a political character" could be extended to the facts he found. I desire to say that in my opinion in the circumstances of this case the course he took was entirely proper. It is clear from his careful judgment that had he thought it open to him he would have held the offence to be political.

The court in *Castioni's* case[4] were careful to say that they were not giving an exhaustive definition of the words "of a "political character." They applied a formula taken from Stephen's History of the Criminal Law, Vol. II, p. 71, as sufficient for the facts of that case, and no doubt when that work was written, about 1882, no better definition could be given. No doubt the conception of what is commonly called nowadays a "police state" was not unknown in the middle years of the nineteenth century. One need only recall the vigour of Mr. Gladstone's language and some of Lord Palmerston's dispatches as to the state of affairs prevailing in Naples, then a part of the Kingdom of the Two Sicilies, under the despotic rule of a monarch usually referred to as King Bomba. But all that had passed by the time Sir James Fitzjames Stephen wrote, though no doubt political police were still very active in Czarist Russia. The evidence about the law prevalent in the Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused.

This is enough to dispose of the case, but we have been pressed by the Attorney-General to consider the opinion of Hawkins J. in *In re Castioni*,[5] where he appears to hold that the magistrate cannot decide the question whether or not the offence is political, though he concedes that it is open to this court to do so on a motion for a habeas corpus. *Castioni's* case[5] was in some respects adversely criticized in *In re Siletti.*[6] The court (Bigham and Darling JJ.) were both of opinion that the observations in *Castioni's* case[7] that the court could revise the decision of the magistrate on the evidence were obiter and inconsistent with the decisions in *Ex parte Huguet,*[8] *Regina* v. *Maurer,*[9] and *In re Arton* (*No.* 2).[10] In the last case Lord Russell C.J. said[11]: "We are not a Court of Appeal on questions of fact from "[the magistrate]. We have only to see that he had such evi-"dence before him as gave him authority and jurisdiction to "commit." In *Siletti's* case[12] Bigham J. said: "... the only "question that this court can entertain is the question of juris-"diction. Applying the observation to this particular Act, the "accused may say that the crime with which he is charged was "not a crime within the meaning of the Act—that is to say that "it did not come within the class of offences contemplated, or "that it was an offence of a political character, and therefore was "outside the Act altogether."

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[4] [1891] 1 Q.B. 149.

[5] [1891] 1 Q.B. 149, 163.

This appears to me to lay down the true rule. The effect of section 3 (1) is to prevent a crime of a political character coming within the purview of the Act. If the crime is of that character the magistrate has no jurisdiction to commit. If the magistrate wrongly gives himself jurisdiction by holding that a crime is not of a political character when it is, this court can and must interfere, and both *In re Castioni*[13] and *In re Siletti*[14] affirm this. Moreover, apart from authority this is what in my opinion the statute provides. Clearly the second limb of section 3 (1) contemplates a decision of the magistrate on the subject; the first limb, as I have said above, concerns an offence which the evidence called to support extradition shows is political. The second limb contemplates a charge which on its face appears to be one of those set out in the schedule but which on examination of the evidence tendered is shown to be really of a political character. The magistrate must give a decision on this matter and his decision is open to review on habeas corpus. In support of this view I would refer to the statutory form of the warrant of committal. It recites "and forasmuch as no sufficient cause "has been shown to me why he should not be surrendered." If the magistrate can decide that there is no sufficient cause for refusing to surrender the prisoner, it must follow that he can also find that there is. Section 9 requires the magistrate to hear the case in the same manner and with the same jurisdiction and powers as if the prisoner was before him charged with an indictable offence and to receive any evidence which may be tendered to show that the crime of which the prisoner is charged is of a political character and not an extradition crime. Hawkins J., in *Castioni's* case,[15] seems to have thought that this required the magistrate merely to take the evidence of witnesses for the defence so that it could be considered either by this court or by the Secretary of State, and he referred[16] to Russell Gurney's Act (30 & 31 Vict. c. 35). With all respect to the opinion of one who was a great authority on criminal law, the provision in that Act to which he was referring was, I think, intended to fill a gap in the Indictable Offences Act, 1848. The latter Act did not appear expressly to contemplate taking the depositions of and binding over witnesses for the defence, and this was remedied by section 3 of Russell Gurney's Act. But however that may have been, the position is now clarified by section 12 (8) of the Criminal Justice Act, 1925, which provides that before determining whether or not to commit for trial any statement by the accused and any evidence given by him or his witnesses must be taken into consideration.

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[6] (1902) 71 L.J.K.B. 935; 18 T.L.R. 771.

[7] [1891] 1 Q.B. 149.

[8] (1873) 29 L.T. 41.

[9] (1883) 10 Q.B.D. 513.

[10] [1896] 1 Q.B. 509, 518; 12 T.L.R. 189.

[11] [1896] 1 Q.B. 518.

[12] 71 L.J.K.B. 935, 937.

[13] [1891] 1 Q.B. 149.

[14] 71 L.J.K.B. 935.

Accordingly I am of opinion that it is the duty of the magistrate to determine upon the whole of the evidence whether or not the offence is of a political character and also whether it is an extraditable crime. He cannot determine this finally against the prisoner because the latter can question the decision on habeas corpus. This does not mean that this court will review the magistrate's findings of fact, but they will and must consider the result of those findings.

DEVLIN J. I agree.

Application granted.

J. A. G.

Solicitors: *Chancellor, Jaxa & Partners; Director of Public Prosecutions.*

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[15] [1891] 1 Q.B. 149.

[16] Ibid. 163.

1955
Feb. 23.

Lord Goddard C.J.

M. RAVOK (WEATHERWEAR) LD. *v.* NATIONAL TRADE PRESS LD.

Trade Mark—Infringement—"Use" of trade mark—Publication of directory listing wrong firm as registered proprietor of plaintiffs' trade mark—Liability of publishers for "use" of mark—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 4 (1), 68 (2).

The defendants, who were the publishers of a trade marks directory, erroneously listed in the directory A. Ld. as the registered proprietors of the trade mark "Weatherite" in respect of weatherproof clothing, sports wear and leather clothing, whereas, in fact, the plaintiffs were the registered proprietors of the mark. On a claim by the plaintiffs under the Trade Marks Act, 1938, for an injunction to restrain the defendants from infringing the mark:—

Held, that the action of the defendants did not constitute a "use" of the trade mark within the meaning of section 4 (1) of the Act of 1938 [1]; and that, therefore, whatever other cause of action might be open to the plaintiffs, the defendants had not infringed the trade mark under the Act.

TRIAL of a preliminary issue.

The plaintiffs, who were the registered proprietors of the trade mark "Weatherite," in respect of waterproof and rainproof clothing, golf blouses, sports jackets, shorts and trousers, claimed an injunction to restrain the defendants from infringing the trade mark by listing, in a directory published by the defendants and called the "Branded Merchandise and Trade Marks Directory, "1954," a company known as S. Aronsohn Ld. of 109, Great Eastern Street, London, E.C.2, as the registered proprietors of the trade mark in relation to the above goods. The plaintiffs also claimed damages.

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[1] Trade Marks Act, 1938, s. 4 (1): "Subject to the provisions of this "section, and of sections 7 and 8 of "this Act, the registration . . . of a "person in Part A of the register as "proprietor of a trade mark . . . in "respect of any goods shall, if valid, "give or be deemed to have given to "that person the exclusive right to "the use of the trade mark in relation to those goods . . . and, "without prejudice to the generality "of the foregoing words, that right "shall be deemed to be infringed by "any person who . . . uses a mark "identical with it or so nearly "resembling it as to be likely to "deceive or cause confusion, in the "course of trade, in relation to any "goods in respect of which it is "registered, and in such manner as "to render the use of the mark likely "to be taken . . . (*b*) in a case in "which the use is . . . in an advertising circular or other advertisement issued to the public, as "importing a reference to some person having the right either as "proprietor or as registered user to "use the trade mark or to goods with "which such a person as aforesaid is "connected in the course of trade."

The defendants, while admitting that they had listed in the directory the name of S. Aronsohn Ld. as the registered proprietors of the trade mark, denied that such listing constituted an infringement of the plaintiffs' trade mark in law.

Master Diamond directed that this question should be tried as a preliminary issue.

Montague Waters for the plaintiffs. The short issue is whether the defendants have infringed the plaintiffs' trade mark within section 4 (1) of the Trade Marks Act, 1938. This is not a case of slander of title because in such a case malice would have to be proved. Here the publication was innocent, but there was an infringement of an exclusive right within section 4 (1) in that the defendants used the plaintiffs' trade mark in relation to waterproofs. There is here an infringement of the substantive right granted to the plaintiffs by the first part of section 4 (1) before the words "without prejudice to the generality," but if that be wrong, then the case comes within section 4 (1) (*b*).

The words "in relation to any goods" which, by section 68 (2), are to be construed as a reference to use "upon, or in "physical or other relation to, goods" is sufficient to cover the present case. *Bismag Ld.* v. *Amblins* (*Chemists*) *Ld.*[2] is relied on. Here the directory was saying, in effect, "If you want "Weatherite clothing go to S. Aronsohn." That constitutes an infringement.

Neville Faulkes for the defendants. It is conceded that if Aronsohn's had claimed to be the proprietors of the trade mark that would have been an infringement by Aronsohn's. But section 4 (1) does not apply to a false statement in a directory. The dissenting judgment of MacKinnon L.J. in the *Bismag* case[3] is relied on. The most important words in section 4 (1) are "in the "course of trade." Those words mean in the course of buying and selling goods; they do not include in the course of compiling a directory. In *Aristoc Ld.* v. *Rysta Ld.*[4] it is laid down that "trade" in the phrase "in the course of trade" is used in the sense of merchanting and selling the goods. Therefore a person who wrongly describes waterproof clothing as being manufactured by A instead of B cannot be said to be trading. Kerly on Trade Marks, 7th ed., pp. 414, 415, sets out the position clearly and is adopted. Here there was not a "use" of the trade mark but merely a recording. As to the question of "exclusive right," *Irving's Yeast Vite* v. *Horsenail*[5] is in point. If a person says that someone has the right to use a trade mark who has not, that may be actionable, but it is not an infringement. To say that this is Aronsohn's trade mark is not "using" a trade mark, still less is it using it "in the course of trade."

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[2] [1940] Ch. 667; 56 T.L.R. 721; [1940] 2 All E.R. 608.

[3] [1940] Ch. 667.

[4] [1945] A.C. 68; 61 T.L.R. 121; [1945] 1 All E.R. 34.

Waters in reply. As to the meaning of the term "in the "course of trade," the authorities are only relevant on the question of deemed infringement. The words were interpreted by the House of Lords only in relation to section 68 (1) and not section 4 (1). In any event, the words refer only to deception or confusion. If the words mean in the course of trade in these goods, it is conceded that the defendants were not using the goods in the course of trade, in which case the first part of the section is relied on.

The defendants "used" the mark by putting it in the directory. Section 68 (2) refers to the use of the mark "or in "other relation to the goods." That subsection should be read in conjunction with the introductory words of section 4 (1).

[Lord Goddard C.J. The most important point is what is meant by the word "use."]

The word is defined by Lord Greene M.R. in the *Bismag* case,[6] but there he is dealing with paragraph (*a*). The criticism of the *Bismag* case[6] in the *Aristoc* case[7] was obiter.

Lord Goddard C.J. This is a point of law upon the pleadings set down for hearing by the court. The point is: Whether the publication and distribution by the defendants of a directory called the "Branded Merchandise and Trade Marks Directory, "1954," in which they list S. Aronsohn Ld. as the registered proprietors of the trade mark "Weatherite" in relation to weatherproof clothing and sports wear, constitutes an infringement of the said trade mark of which the plaintiffs are the registered proprietors in respect of such goods.

The point is, so far as I am aware, one which has never been considered by the courts before, at any rate in this form. There is no dispute as to the facts. The defendants are the proprietors of a publication called "Branded Merchandise and Trade Marks "Directory, 1954," and in that publication they have listed under the word "Weatherite": "Waterproof clothing, sports wear and "leather clothing: S. Aronsohn Ld., 109, Great Eastern Street, "London, E.C.2." "Weatherite" is not the trade mark of Aronsohn's, but the trade mark of the plaintiffs. I am told that there is no reflection on the good faith of the defendants; it is a mere mistake. It may be that this inaccurate statement gives a cause of action to the plaintiffs; but the action which has been brought is one for infringement of a trade mark, and I have to consider whether or not the trade mark has been infringed within the meaning of the Trade Marks Act, 1938.

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[5] (1934) 50 T.L.R. 205; 51 R.P.C. 110.

[6] [1940] Ch. 667.

[7] [1945] A.C. 68.

Section 68 defines "trade mark," and subsection (2) provides: "References in this Act to the use of a mark shall be construed "as references to the use of a printed or other visual representation of the mark, and references therein to the use of a mark in "relation to goods shall be construed as references to the use "thereof upon, or in physical or other relation to, goods." There is no doubt in my mind that if Aronsohn's had inserted this advertisement or authorized this advertisement to be inserted they would have been infringing the trade mark. The question is whether the publishers of the book "used" the trade mark merely because they published, in error, a statement that "Weatherite" was the trade mark of somebody whose trade mark it was not.

[His Lordship read section 4 (1) of the Act, and continued:] There is no authority that assists me in this matter; but it seems to me that the governing words in these cases are "in the "course of trade," and those words mean, as the House of Lords pointed out in *Aristoc Ld.* v. *Rysta Ld.*,[1] in the course of trade in the goods in question. If I take the first part of the section as it stands alone (as Mr. Waters has invited me to do, because the second part of the section says that it is without prejudice to the generality of the first part), I cannot see that the fact that a person has improperly said, in a directory or other publication, that A B is the proprietor of a trade mark is a "use" of the trade mark by the person who has made the statement. If he had been authorized by A B to make that statement it would be a "use" by A B; but I cannot see that it is a "use" of a trade mark by the person who has made the incorrect statement. He is not applying it to goods himself; he is not dealing with goods; and certainly he is not "using" it "in the course of trade" and "in relation to those goods." He is using it in the course of

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[1] [1945] A.C. 68.

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his own trade, which is that of a publisher of a trade directory; and, although the words in section 4 (1) (*b*), taken by themselves, give some colour to the argument which has been put before me by the plaintiffs, I think that it all comes back to the question what is a " use " under this section.

I think that the publication does not amount to a " use "; and although I am far from saying that there may not be a remedy, the remedy of infringement under the Act, which has been chosen in the present case, is not appropriate. Therefore, I answer the question which is submitted by saying that the publication does not constitute an infringement of trade mark. That disposes of the action, and there will be judgment for the defendants with costs. It is a very proper matter to take to the Court of Appeal, where, no doubt, it will be taken.

Judgment for the defendants.

Solicitors: *Davies, Arnold & Cooper; Oswald Hickson, Collier & Co.*

J. D. P.

1955
Feb. 22, 23.

Harman J., sitting as an additional judge of the Queen's Bench Division.

AGLIONBY *v.* COHEN.

[1952 A. 1372.]

Landlord and Tenant—Notice to quit—Notice ignored by tenant—Action to recover possession of premises—Judgment for possession—Tenant continues to occupy premises—Whether landlord entitled to enter premises and retain possession without carrying out further legal procedure.

A landlord, who had served on the tenant of a furnished room a notice to quit, which he had ignored, commenced an action to recover possession of the premises and obtained judgment against the defendant in default of appearance. The tenant continued to occupy the premises and the landlord, without calling in the help of the sheriff, put his (the tenant's) chattels outside the premises, and obtained possession:—

Held that, notwithstanding that the landlord had invoked the law and obtained judgment for possession, he had not lost his common law rights and was entitled in the circumstances, without calling on the services of the sheriff, to enter as he did: he had not caused the tenant to change his position in reliance on his (the landlord's) call on the law.

Hemmings v. *Stoke Poges Golf Club* [1920] 1 K.B. 720; 36 T.L.R. 77 and *Lacy* v. *Berry* (1659) 2 Sid. 155 applied.

Dictum in *Doe* d. *Stevens* v. *Lord* (1838) 6 Dowl. 256 considered.

ACTION.

The plaintiff, Hugh Anthony Aglionby, let to the defendant, J. Cohen, a furnished room in a house at Orpington, with certain rights of sharing the kitchen and garden on a weekly tenancy, beginning on April 7, 1951. The plaintiff purported to determine the tenancy on April 6, 1952, giving the defendant notice to quit expiring on May 3, 1952. A writ for possession was issued by the plaintiff on May 6, 1952, and served on the defendant on May 9, 1952. Judgment in default of appearance was signed against the defendant on May 29, 1952. On June 11, 1952, the plaintiff took possession of the premises in the defendant's absence and removed his chattels.

An order for mesne profits was made by a Queen's Bench master on June 25, 1952. On July 26, 1952, the defendant swore an affidavit for the purpose of having the judgment set aside, and it was set aside on August 25, 1952.

The question before the court was whether the plaintiff, who was entitled to possession under the judgment, was entitled to take possession of the premises without the assistance of the sheriff.

The defendant by his counterclaim complained that he had been deprived by the plaintiff of the use and enjoyment of the premises and claimed certain sums of money, the return of certain goods and damages for their detention, and an injunction restraining the plaintiff from denying the defendant access to the premises.

By his reply the plaintiff claimed that he was at all times, on and after May 3, 1952, entitled to take and retain possession of the premises as against the defendant, and, alternatively, that at all times between May 29, 1952, and August 28, 1952, when the judgment was set aside, he was entitled so to take and retain possession.

Robert Hales for the defendant. The notice to quit was bad. If the notice was good, the plaintiff acted unreasonably in removing the goods of the defendant, in the course of which they became damaged. A landlord, who has obtained an order for possession of premises, is not liable in trespass to the goods thereon, provided he acts reasonably. It is otherwise where the goods are damaged owing to careless and unreasonable treatment of them. [Reference was made to *Jones* v. *Foley*[1] and *Hemmings* v. *Stoke Poges Golf Club*.[2]]

Paul Sieghart for the plaintiff. The notice to quit was good. Trespass will not lie against a landlord who is entitled to possession, whether his entry is peaceable or forcible, so long as he uses no more force and does no more damage than is reasonably necessary: *Hemmings* v. *Stoke Poges Golf Club*.[3]

There is no question of electing between the common law remedy of self-help and the use of the process of the court. There is ancient authority to the contrary: see *Lacy* v. *Berry*[4]; *Harris* v. *Austen*.[5] There are also cases in Dyer's Reports, Noys' Reports and Palmer's Reports to the same effect. The function of the sheriff is only to preserve the peace and the recoverer may enter when the demand is certain. [Reference was made to (1955) Ann.Prac. 842, note to Ord. 47, r. 1, which cites Chitty's Archbold Practice, 14th ed., p. 1229.] There are similar passages in Runnington on Ejectment, 2nd ed. (1820), pp. 474, 475, and 2 Crompton's Prac. (Sellon), p. 121. The only authority apparently to the contrary is *Doe* d. *Stevens* v. *Lord*,[6] but this case can be distinguished on the facts and, in any event, the dictum of Patteson J. on p. 266 supporting the contrary view is obiter.

In the present case all reasonable care was taken of the defendant's goods.

HARMAN J. This is an action which has become considerably involved. The defendant was tenant of the plaintiff of a furnished room in a house and had certain rights to share in the kitchen and garden at a weekly rental. The plaintiff, having given what he alleged to be an adequate notice to quit, brought this action in ejectment by writ dated May 6, 1952. The writ was personally served on the defendant on May 9, and, he entering no appearance, judgment in default was signed on May 29, and subsequently there were proceedings before the master to assess the mesne profits.

For some reason not apparent to me the plaintiff's solicitors did not take further steps to enforce the writ by calling in the help of the sheriff for the purpose. It would have been better had they done so. The plaintiff, becoming impatient of the law's delays, took the matter into his own hands and, by his wife as his deputy, entered the room on June 11, put the defendant's chattels outside, and thereafter retained possession of it against the defendant.

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[1] [1891] 1 Q.B. 730; 7 T.L.R. 440.

[2] [1920] 1 K.B. 720; 36 T.L.R. 77.

[3] [1920] 1 K.B. 720.

[4] (1659) 2 Sid. 155.

[5] (1615) 1 Roll.Rep. 210.

[6] (1838) 6 Dowl. 256, 266.

The defendant took legal advice about a fortnight later and, on June 23, by solicitors complained that he had been wrongfully ejected and alleged, quite untruly, that the rent tribunal had granted him (the defendant) some so-called security of tenure. There was thereafter a kind of desultory bombardment between the solicitors and application was eventually made on the defendant's behalf to set aside the judgment. That application was supported by an affidavit, which is a tissue of lies from beginning to end, and which must have been perfectly well known by the defendant to be so. Why he thought it worth his while to tell untruths in so transparent a manner is not obvious to me, but what is clear enough is that the plaintiff's solicitors did not put in an affidavit in answer or contradict the untruths which were scattered throughout that document, as they might have done. The result was that the judgment was set aside on August 28, 1952, as was inevitable having regard to the fact that there was no contradiction of the defendant's statements.

The judgment having been set aside, the defendant delivered, on September 9, 1952, a defence and counterclaim in which, for the first time, it was alleged that no notice to quit or no valid notice to quit had ever been served on him, and that the plaintiff had wrongfully broken into and entered his flat and ejected him and caused him certain special damage. He asked by way of counterclaim for an injunction to restrain the plaintiff from denying him access to the premises. It was not relief that, so far as I can see, he wanted at that time. He has long ceased to want it, and the plaintiff has himself ceased to have any interest in the property. So one arrives at this unreal situation, that the plaintiff asks for possession of that which he had, but gave up voluntarily and does not want, and the defendant asks to be reinstated in a room in which no power on earth would induce him to reinstate himself. There is no substance in the action except costs. There is, however, something in the counterclaim, because, if the notice to quit were bad and the entry, therefore, unlawful, the defendant might conceivably sustain some claim for damages against the plaintiff, although he failed to prove any substantial damage when he went into the witness-box.

[After considering the evidence as to the validity of the notice to quit, his Lordship held that the defendant's evidence was untrue, and that he had received a valid notice to quit in writing on April 6, 1952. His Lordship then continued:] That being so, it seems to me that the judgment of May 9, 1952, was a good judgment for possession when it was given, and that it was set aside on August 28, 1952, by reason of the untruths deposed to by the defendant, although the plaintiff is largely himself to blame because he did not contradict those untruths or cross-examine the defendant about them, as he could have done.

Therefore, the plaintiff was entitled to sue out his writ for possession, but he did not do that. He chose to take the law into his own hands and to enter himself. It has been well known to be the law ever since the celebrated case of *Hemmings* v. *Stoke Poges Golf Club*,[1] that if no more force be used than is necessary a man may turn a trespasser off his property and put his chattels out of the house, but it occurred to me in the course of the hearing that as the plaintiff had invoked the process of law and obtained a judgment that might oust him from his common law rights and make it necessary that he should carry the law through to the logical conclusion for which he had invoked it.

I put this matter to Mr. Sieghart who was, I am glad to say, fully alive to it and he addressed me on the subject. It appears to be a matter on which there is very little modern authority. There is a passage in the Annual Practice in the notes under Ord. 47, r. 1, at p. 842 of the 1955 edition, which says this: "A plaintiff having a judgment for possession may, it seems, "enter at his own risk without suing out a writ of possession, if he "can do so without force. See Chitty's Arch. 1229." Reference to this passage shows it to be based on Runnington on Ejectment, p. 474, and 2 Crompton's Pract. (Sellon), p. 121. I find also in the second edition of Woodfall on Landlord and Tenant (1834), at p. 805, these words: "The plaintiff having judgment to "recover his term may enter without issuing out a writ of "execution—which is called habere facias possessionem—for "where the land recovered is certain the recoverer may enter at "his own peril: and the assistance of the sheriff is only to preserve "the peace." This is clearly based on the passage in Siderfin mentioned below.

Two authorities were cited to me in support: first, an observation by Coke C.J. in *Harris* v. *Austen*,[2] whereby it appears that the learned Chief Justice thought it was clear that a man, if he did not wish to avail himself of the services of the sheriff, might dispense with them. It was not anything more than an obiter dictum, because the matter there concerned was the presentation of a clerk to the bishop, but in some way or other the Chief Justice thought that a good analogy was that of a man who used self-help when he might have had the services of the sheriff, and the Chief Justice thought it quite clear that he might.

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[1] [1920] 1 K.B. 720.

[2] 1 Roll.Rep. 210, 213.

Second was the observation in Siderfin, above referred to, which, like a good many of these old observations, is merely the reporter's note. It appears under the case of *Lacy* v. *Berry*,[3] namely: "*Nota, que apres tiel recovery l'un poet enter sans le* "*vic*,"—that is the sheriff, as I understand it—"*car son assist-* "*ance est forsq a preserver le peace*"; that is to say, the reporter thinks that all you need the sheriff for is preserving the peace, and even after obtaining your writ you may enter if you wish to do so. Then it says: "*A ceo per cu.*," in other words, that was the opinion of the whole court. One does not know what the judge said, but only what the reporter's notion was of what the court thought.

There is one authority tending against that, namely, *Doe* d. *Stevens* v. *Lord*.[4] It was a case arising out of an entry by a mortgagee or a lessor, which had been set aside because he made his entry more than a year after he had got his order. The point was not decided, but Patteson J. expressed a view, after hearing argument about it, in these words: "I desire that it may not go "forth that I, for one, assent to the doctrine which has been "contended for, that a party having recovered in ejectment may, "by his own hand only, and without the authority of the process "of the court, enter upon and retain possession of the land so "recovered." So there is that rather weighty opinion that the doubt which I expressed at least has that justification.

On the whole, however, I think that the view which I am entitled to take in that state of the law is the one I should take without it, namely, that a man does not lose his common law rights because he invokes the law up to a certain point. The plaintiff did not cause the defendant to change his position in reliance on his call on the law and, therefore, it is not a case of putting him to his election, and I do not see why, if he chooses to take the risk—and it may be a very unwise thing to do—he should not do so. He did that in this case, and, in my judgment, he was entitled to enter as he did.

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[3] 2 Sid. 155, 156.

[4] 6 Dowl. 256, 266.

There was an assessment of the plaintiff's damages in the action, as I understand it, before the Queen's Bench master at £9 7s. 6d. and costs. I suppose they were the costs of the assessment.

I shall therefore award the plaintiff £9 7s. 6d. with such costs as a judgment for that amount carries with it.

Solicitors: *Thornton, Lynne & Lawson; Wegg-Prosser & Co.*

J. L. D.

C. A.

1955
Mar. 14.

Denning and Parker L.JJ.

COLLINS v. JONES.

[1953 C. No. 429.]

Libel and Slander—Libel—Practice—Pleadings—Allegation of libel in letters—Purported citation from unidentified documents—Contents of letters not known to plaintiff—Speculative pleading—R.S.C., Ord. 3, *r.* 9.

The defendant, a medical practitioner, wrote a letter to the chairman of a county borough council committee, as a result of which an inquiry was held by the council a year later. At the inquiry the defendant made oral statements, including the statement that before writing to the chairman he had seen the medical officer of health, and that "two letters passed." A transcript of the proceedings at the inquiry was shown to the plaintiff, a children's officer employed by the council.

The plaintiff brought an action against the defendant for libel in respect of the letter to the chairman and for slander in respect of the oral statements made at the inquiry. Paragraph 7 of the statement of claim alleged further that the defendant published two letters to the medical officer of health, and also published certain specific words set out in the paragraph in a form which made them appear to be verbatim citations from a document; and the plaintiff claimed that these constituted further libels on her.

An application by the defendant for an order for particulars of the two letters, specifying the date, time and place of publication, and the way in which the purported citation appeared in each letter was refused by the registrar, and, on appeal, by Donovan J. On appeal by the defendant:—

Held, that since the plaintiff had not seen the two letters and was unaware of their contents, and paragraph 7 was based on speculation, and since a plaintiff was not entitled to bring an action for libel unless the actual words complained of could be set out with reasonable certainty in the pleading, the plaintiff should deliver the particulars asked for.

Dictum of Lord Coleridge C.J. in *Harris* v. *Warre* (1879) 4 C.P.D. 125, 128 applied.

Order of Donovan J. varied.

INTERLOCUTORY APPEAL from Donovan J.

The defendant, Dr. Gwent Jones, a medical practitioner, wrote a letter on October 3, 1952, to the chairman of the children's committee of a county borough council, as a result of which an inquiry was held in September, 1953, before a sub-committee of the council. During the inquiry the defendant made oral statements, including a statement that before he wrote to the chairman, he had been to see Dr. Meyrick (the medical officer of health); that two letters had passed; and that he (the defendant) had then written the letter to the chairman. A transcript of the proceedings at the inquiry was shown to the plaintiff, Margaret Lilian Collins, a children's officer employed by the council.

The plaintiff issued a writ on November 17, 1953, alleging that the defendant had published a libel on her in the letter to the chairman of October 3, 1952. By her statement of claim, delivered on June 23, 1954, she alleged that that letter constituted a libel on her in that the defendant had implied in it that her treatment of the matrons of two children's homes had affected their health. She alleged further that oral statements by the defendant at the inquiry constituted slanders on her.

Paragraph 7 of the statement of claim was as follows: " In or " about the months of September or October, 1952, the defen- " dant falsely and maliciously wrote and published . . . two letters " addressed to E. B. Meyrick " (there followed references to the words set out in the allegations as to slander). The paragraph continued: " The defendant further wrote and published the " following words: ' The children's officer ' (meaning thereby the " plaintiff) ' has persecuted the matron of the West Cross Nursery " ' and thereby retarded her recovery to health and systematically " ' persecuted the master and matron of the Cottage Homes, with " ' the result that they left their employment and retired " ' prematurely.' "

The defendant asked for particulars of paragraph 7, to which the plaintiff replied that particulars could not be given as inspection of the letters could not be obtained. The defendant thereupon applied to the registrar, asking for an order for particulars of each of the letters, specifying the date, time and place of publication of each; identifying the person or persons to whom each was alleged to have been published; and specifying which of the words set out or incorporated in paragraph 7 were alleged to have been published or contained in each of the letters, and setting out the precise words complained of in each. The plaintiff's answer was that the letters were published to Dr. Meyrick.

The registrar refused to make the order asked for, and the defendant appealed to Glyn-Jones J., who adjourned the hearing in order that a further affidavit might be filed on behalf of the plaintiff as to the existence of the letters. The appeal was then heard by Donovan J., who refused to make the order asked for.

The defendant appealed, asking for an order that particulars should be given, and in default of such particulars, that paragraph 7 should be struck out.

R.S.C., Ord. 3, r. 9, provides: "In actions for libel the "indorsement on the writ shall state sufficient particulars to "identify the publications in respect of which the action is "brought."

H. V. Lloyd-Jones Q.C., *Norman Richards* and *Geoffrey Howe* for the defendant. R.S.C., Ord. 3, r. 9, imposes on a plaintiff in an action for libel an obligation to identify the publication in respect of which the action is brought. Paragraph 7 of the plaintiff's statement of claim sets out what purports to be a verbatim citation from letters. The only evidence the plaintiff has is that in the shorthand transcript of the proceedings at the committee of inquiry it was stated that two letters passed. She suspects that they contain defamatory matter. The fundamental issue is: Can it be inferred from the existence of those letters that a libel has come into existence? The plaintiff has taken all the steps open to her to show grounds for such an inference, but has failed. It is submitted, therefore, that the claim in paragraph 7 is a speculative and fishing inquiry, part of an attempt to build up a case out of letters she cannot identify. She hopes that this inquiry will lead to the production of the letters either on discovery or on subpoena at the trial, when leave to amend will be sought. But the court, it is submitted, will not sustain such an inquiry, and if the plaintiff cannot comply with the defendant's request for particulars identifying the letters, this part of her claim should be struck out.

The point at issue was decided by this court in *Guest* v. *Iraq Petroleum Co. Ld. and Todd*,[1] where a paragraph in a statement of claim alleging that there had been letters to a third person containing matter defamatory of the plaintiffs was struck out. It is conceded that in *Guest's* case [1] there was no evidence that the letters had ever existed, whereas in the present case it is known that letters came into existence; but Jenkins L.J., in deciding *Guest's* case,[1] said that even assuming that a letter had been written by the second defendant to a third party, he (his Lordship) failed to see how that would constitute sufficient ground for supposing, or alleging, that such letter contained any libellous matter; and Hodson L.J., distinguishing *Russell* v. *Stubbs Ld.*,[2] said that whereas in the latter case the plaintiff had satisfied the court that there had been publication to other persons, the plaintiffs in *Guest's* case [3] had been unable to show that there was or had been in existence a libel of the kind supposed in the plaintiffs' mind to exist. The decision in *Guest's* case [3] covers the present case.

Kennedy L.J. in *Russell* v. *Stubbs Ld.*[4] said that the court should not allow anything which could properly be considered as a fishing application made for the purpose of maintaining an action or of bringing further actions; and the same judge, in *Barham* v. *Lord Huntingfield*,[5] disallowing certain interrogatories, said much the same thing and distinguished *Russell* v. *Stubbs Ld.*[6] as being a case in which the plaintiffs were not alleging publication of a different libel of which they sought discovery, but only wider publication of the same libel which they knew had been published to one named person.

[DENNING L.J. The passage in the speech of Lord Loreburn in *Russell* v. *Stubbs Ld.*,[7] namely, that a probability that the statement would be sent out to all who asked for it was established in fact by the circumstance that the defendants did make the same communication to the plaintiffs' solicitors when they asked for it, might be used against the defendant here; for here it is not mere probability that letters passed, but fact. The plaintiff's difficulty is to know in what terms they were couched.]

[PARKER L.J. The court has to hold the balance between a defendant being embarrassed by a fishing inquiry and a plaintiff being embarrassed by not being able to produce letters which are in the hands of a third party.]

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[1] Unreported. (C.A. Judgts. 1954, No. 142 (Bar Library).)

[2] [1913] 2 K.B. 200n.

[3] Unreported, May 7, 1954 (C.A.).

[4] [1913] 2 K.B. 200n., 203.

[5] [1913] 2 K.B. 193, 197.

[6] [1913] 2 K.B. 200n.

[7] Ibid. 206.

The terms of Ord. 3, r. 9, are such that there is no question of holding a balance. The rule places an obligation on the plaintiff to identify the publication in respect of which she brings her action.

[PARKER L.J. But if the rule imposed an absolute obligation *Russell* v. *Stubbs Ld.*[8] would have been decided otherwise, for the plaintiffs there did not comply with the rule; they did not state sufficient particulars on the writ to identify the publications.]

They were able to say that *a* document had been published, and sought to discover to whom it had been published. The emphasis was on the publication and not on the libel. The case is quite different from the present.

F. Elwyn Jones Q.C. and *E. Wallis-Jones* for the plaintiff. There is clear authority in the House of Lords, in *Harris* v. *Warre*,[9] for the course which the plaintiff has taken and proposes to take, namely, to call the medical officer of health at the trial to produce the letters, and then, if necessary, to amend paragraph 7 in the light of what the letters contain: see Gatley on Libel and Slander, 4th ed., p. 460, setting out the substance of the speech of Lord Coleridge C.J. in *Harris* v. *Warre*,[10] namely, that if a plaintiff is unable to set out the very words of the libel because the holder of the defamatory letter refuses to hand it over to him or give him a copy or reveal its contents, his only course is to draft his statement of claim as best he can, and serve such holder with a subpoena duces tecum; and that at the trial he can then apply to the judge for leave to amend.

[DENNING L.J. Is it said that the plaintiff can invent words believed to be in the letters and then amend when she has a sight of the letters at the trial?]

No; but so long as she has some evidence, a prima facie case that the letters probably contain defamatory matter, she can apply for leave to amend at the trial. If it is then found that there is a substantial variation between the libel as pleaded and the words in the document, the judge could refuse leave to amend.

[DENNING L.J. But the plaintiff will then have had a sight of a letter which may contain a libel and on which she can bring a new action.]

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[8] [1913] 2 K.B. 200n.

[9] (1879) 4 C.P.D. 125.

[10] Ibid. 127.

The court in the exercise of its discretion must strike a balance between the interests of the plaintiff and the defendant. In *Saunders* v. *Bate*[11] Wightman J. allowed a declaration, which merely set out the effect of a libellous letter, to be amended by setting out the letter verbatim, and offered to postpone the trial to enable the defendant to justify the amended declaration.

[DENNING L.J. That seems to show that one cannot have a hard-and-fast rule that if a plaintiff has not got the letter she cannot start an action for libel.]

That must be so; for otherwise a plaintiff libelled behind his back will have no remedy. It is submitted that the court must be satisfied here as to two matters: (1) Do these letters exist? There is no doubt that they do exist. The defendant has never denied their existence or even that they are defamatory; and (2) is there a prima facie case, in view of the state of mind of the defendant, the time, and the history of the matter, that the letters contain defamatory matter? The circumstances were that the defendant by his first letter to the chairman was starting a campaign to protect people whom he believed to be unjustly persecuted. There is then the evidence of the shorthand note. It is submitted that in all those matters there is abundant support for the claim that the letters contain defamatory matter, and, that being so, the court cannot deprive the plaintiff of particulars to enable her to see what is in the letters. The principle to be applied is that stated by Sir Gorell Barnes P. in *Russell* v. *Stubbs Ld.*,[12] namely, that the court must be reasonably satisfied that the allegation was not a mere fishing allegation but a bona fide allegation of a fact which the plaintiffs hoped to be able to prove; see also *per* Sir Gorell Barnes P.[13] that the defendants must know perfectly well whether they had published the alleged libel and to whom, if anyone, so that the allegation could present no difficulty or embarrassment to them in framing their defence. That applies equally here.

The ratio decidendi of Jenkins and Hodson L.JJ. in *Guest's* case[14] was that the plaintiffs had wholly failed to identify the document and the alleged libel was thus too far-fetched. Here the plaintiff has identified the document as Ord. 3, r. 9, requires. The defendant knows what is in the letters, which clearly exist, and the prima facie case is that they contain defamatory matter.

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[11] (1856) 1 H. & N. 402.

[12] [1913] 2 K.B. 200n., 202.

[13] Ibid. 203.

[14] Unreported. (C.A. Judgts. 1954, No. 142.)

The judge rightly exercised his discretion in declining to strike out paragraph 7.

Lloyd-Jones Q.C. in reply. Though *Russell* v. *Stubbs Ld.*[15] does not assist on the problem now before the court, the dictum of Kennedy L.J. that[16] " It is not as if the plaintiffs were asking " for a cause of action, and were seeking to ascertain whether the " defendants had ever published anything defamatory of them " is against the plaintiff's contention here, for that is precisely what she is seeking to do. She has not identified in any strict sense any letters which include the words she cites as verbatim citations. She has set out a synthetic paragraph from a letter she has not seen, composed from a transcript made a year earlier. All that the defendant has said is that he wrote two letters. If the pleader had left that as a matter of substance the issue might be different; but he has made the mistake of asserting specific words.

Regard should be had to the historic current of the judicial attitude to this kind of pleading throughout the last century. It has been against allowing anything in the nature of an attempt to constitute a case when one does not know but only hopes to find the alleged document or passages. The plaintiff ought to give the particulars asked for, and if she does not comply the paragraph should be struck out.

DENNING L.J. stated the facts as to the claim for the alleged libel in the letter to the chairman and the alleged slanders, and said that those matters clearly had to go to trial. His Lordship continued: The matter with which we are particularly concerned today is an allegation in paragraph 7 of the statement of claim, in which Miss Collins says that the defendant, in September and October, 1952, before he wrote to the chairman of the committee, wrote two letters to Dr. Meyrick, the medical officer of health.

The plaintiff says that in those letters the defendant wrote and published the following words, which the plaintiff sets out in inverted commas: " ' The children's officer ' (meaning the plain- " tiff) ' has persecuted the matron of the West Cross Nursery " ' and thereby retarded her recovery to health and systematically " ' persecuted the master and matron of the Cottage Homes with " ' the result that they left their employment and retired " ' prematurely.' "

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[15] [1913] 2 K.B. 200n.

[16] Ibid. 204.

The defendant, through his legal advisers, asks for particulars of the letters. He wants the plaintiff to specify the date, time and place of publication, and how these words occur in them. The question is whether the defendant ought to have those particulars.

The plaintiff has not seen those letters at all, and her advisers have not seen them. They do not know what they contain. They are guessing. They only got to know of the letters because at the inquiry the defendant let fall that he had written to the medical officer of health. He said at the inquiry: "Before I "wrote to the chairman I was torn between two things. I took "counsel with some people who are familiar with the way these "things work. I was torn between going to see the town clerk and "to see Mrs. Cross"—that is, the chairman of the committee—"but, before deciding, I went to see Dr. Meyrick, the medical "officer of health. Two letters passed. He advised me to get "into contact with the department. I sent this letter to Mrs. "Cross and the vice-chairman." It is because the defendant told the committee that two letters passed between him and Dr. Meyrick that this allegation of libel is brought against the defendant. The plaintiff has no more knowledge of what the letters contained than what the defendant himself told the committee. The question for our consideration is whether a plaintiff is to be permitted to bring a libel action on speculation, knowing so little of what is in the letters of which she complains.

In a libel action it is essential to know the very words on which the plaintiff founds his claim. As Lord Coleridge C.J. said in *Harris* v. *Warre*[1]: "In libel and slander everything may turn "on the form of words, and in olden days plaintiffs constantly "failed from small and even unimportant variance between the "words of the libel or slander set out in the declaration and the "proof of them . . . In libel and slander the very words com-"plained of are the facts on which the action is grounded. It is "not the fact of the defendant having used defamatory expres-"sions, but the fact of his having used *those* defamatory "expressions alleged, which is the fact on which the case "depends."

Assuming that these letters did contain some statements defamatory of the plaintiff, that is not sufficient to ground a libel action. She must show what the actual words were. A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of the contents of which he is unaware. He must in his pleading set out the words with reasonable certainty: and to do this he must have the letter before him, or at least have sufficient material from which to state the actual words in it. A suspicion that it is defamatory is not sufficient. He cannot overcome this objection by guessing at the words and putting them in his pleading. The court will require him to give particulars so as to ensure that he has a proper case to put before the court and is not merely fishing for one. If he cannot give the particulars, he will not be allowed to go on with the charge. That is what was done in the recent case in this court of *Guest* v. *Iraq Petroleum Co. Ld.*,[2] and I think that we should make a similar order here.

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[1] (1879) 4 C.P.D. 125, 128.

If the plaintiff can give proper particulars, she can, of course, go on with the action: and she can prove her case by subpoenaing the holder of the letter to produce it, as was done in *Saunders* v. *Bate*,[3] and the case referred to in *Harris* v. *Warre*[4]: but before she can do this, she must first be able to launch a case with sufficient certainty. She must give the required particulars.

In my judgment, therefore, the appeal should be allowed and an order made in the terms asked in paragraph (1) of the application.

PARKER L.J. I agree, and despite the fact that we are differing from the judge, I do not think that there is anything I can usefully add.

Ordered that the plaintiff deliver to the defendant the particulars asked for under paragraph 7 of the statement of claim; the defence to be delivered within 14 days after the delivery of the said particulars.

Solicitors: *Hempsons; Theodore Goddard & Co., for D. W. Peter Williams & Co., Swansea.*

M. M. H.

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[2] Unreported. (C.A. Judgts. 1954, No. 142.)

[3] (1856) 1 H. & N. 402.

[4] 4 C.P.D. 125, 127.

REGINA *v.* ROWE.

C. C. A.

1955
April 19.

Lord Goddard C.J., Hilbery and Pearce JJ.

Criminal Law—Appeal—Parties—Death of appellant—Application for leave to appeal by widow—Sentence of imprisonment—Widow no legal interest in quashing of conviction—Widow not entitled to proceed with appeal.

The Court of Criminal Appeal will not entertain an appeal made on behalf of a deceased person unless he who seeks to appeal has a legal interest in the quashing of the conviction, such as the interest of executors in the quashing of the conviction in order to recover, for the benefit of the deceased person's estate, money paid as a fine.

Where, therefore, one R., on conviction, was sentenced to a term of imprisonment and, having given notice of appeal against conviction, died in prison and his widow sought to continue with the appeal:—

Held, that since the sentence imposed had been a sentence of imprisonment and not a fine, the widow's only interest in the appeal was a sentimental one of which the court could not take notice and there was, therefore, nobody who had a legal interest in the setting aside of the conviction and sentence. The appeal, accordingly, could not be allowed to proceed.

Hodgson v. *Lakeman* [1943] K.B. 15 distinguished.

Application for leave to appeal against conviction.

On February 15, 1955, one Ivor Cylde Rowe was convicted at Bedfordshire Quarter Sessions on four counts of obtaining money by false pretences and sentenced to 18 months' imprisonment. On February 21, 1955, within time, he gave notice of appeal, and on the night of March 6–7, before the application had been considered, he died in prison. His widow applied to the court to allow the appeal to proceed.

Peter Lewis, for the widow, asked the court to allow the appeal to proceed. The widow desires to clear her husband's name. There appears to be no authority on the question whether this court can hear an appeal after the death of the appellant, but the Divisional Court did so in the recent case of *Hodgson* v. *Lakeman*,[1] where executors were allowed to proceed with an appeal.

[Lord Goddard C.J. It is clear from the argument and remarks of Viscount Caldecote C.J.[2] in that case that as the penalty imposed had been a fine the executors had an interest in the outcome of the appeal; had it succeeded they would have recovered the fine. The fine was only 35s. but the principle was the same as if it had been £3,000. Nowhere in the report does it appear why the conviction was quashed.]

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[1] [1943] K.B. 15.

[2] Ibid. 16.

The conviction against her husband affects the widow's chances of employment and her position among her friends. If interest is the test, and executors have an interest, then the widow clearly has an interest.

[LORD GODDARD C.J. I do not think that we can take notice of that; she has not a pecuniary interest.]

The question of interest was not raised in the cases summarized in Short and Mellor's Crown Practice, 2nd ed. (1908), p. 425. [Reference was made to *Hesketh* v. *Atherton*,[3] *Leach* v. *Wanstead School Board*,[4] *Siberry* v. *Connolly*,[5] *Rex* v. *Roberts*[6] and *Garnsworthy* v. *Pyne*,[7] and also to Griffits' Guide to Crown Office Practice (1947), p. 95.] The court is asked to say that where any person might be prejudiced by a conviction against a deceased person, and an appeal was lodged before the death of that person, the court will proceed to hear the appeal. If, for example, there had been a flagrant miscarriage of justice and a widow and family were living under the shadow of the fact that their relative had died a convict, the interests of justice would require that the appeal be heard.

[LORD GODDARD C.J. In such a case application could be made for a free pardon.]

The widow's position in the world is affected; she has a definite interest in being the widow of an honest man and not of a man who has been convicted.

LORD GODDARD C.J. Ivor Cylde Rowe was convicted at the Bedfordshire Quarter Sessions on a charge of false pretences and was sentenced to 18 months' imprisonment. He was convicted on February 15. He gave notice of appeal within time on February 21 and he has since died in prison.

Mr. Peter Lewis, instructed not by the prisoner, but by the prisoner's widow, applies to be allowed to continue the appeal, but in the opinion of the court we cannot allow a widow or an executor or an administrator of a deceased person to appeal to this court unless they can show a legal interest. If a person is sentenced to pay a fine and dies having appealed, or even if he dies after payment of the fine—it might be immediately afterwards—it may be that the court would allow executors or administrators to appeal merely on the ground that if the conviction were quashed they could recover the fine for the benefit of the estate of the deceased which they are bound to administer. In *Hodgson* v. *Lakeman*,[1] to which our attention was called, which was a case before the Divisional Court, but the principle would be the same, the appellant was dead, and the court allowed the executors to continue the appeal because there was a pecuniary interest. Supposing, as sometimes happens, a man is convicted on indictment and fined £500; the money has to be paid, and the Crown can recover that money whether he is alive or dead, for it can recover it against his estate, and, therefore, it would be an injustice if the executors were not allowed to appeal and to say that the conviction was wrong, because, if it was wrong, the money would be saved.

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[3] Unreported. November 22, 1873. (Cited in Short and Mellor's Crown Practice, 2nd ed. (1908), p. 425.)

[4] Unreported. October 28, 1902. (Cited ibid., n.)

[5] Unreported. August 30, 1905. (Cited ibid.)

[6] (1732) 2 Stra. 937.

[7] (1870) 35 J.P. 21.

It may be that it is artificial to say that if there is a pecuniary penalty an appeal might lie, whereas if corporal punishment or imprisonment is imposed there cannot be an appeal, but at the same time I do not see any ground on which we can say in the present case that anybody has an interest. It may be that the widow would be very glad to have her husband's name cleared, but we cannot take any notice of that sentimental interest. There is nobody affected now by the judgment of the court because the judgment was a sentence of imprisonment and the prisoner has died. It would be a very novel step if, in these circumstances, we said that the court would entertain an appeal. For these reasons the application for leave to appeal must be refused.

Application refused.

Solicitor: *Giffen & Couch.*

J. F. L.

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[1] [1943] K.B. 15.

J. N. NABARRO AND SONS *v.* KENNEDY.

1954
May 6.

Stable J.

Husband and Wife—Property—Proceedings under Married Women's Property Act, 1882, *s.* 17—*Costs—Husband's liability to wife's solicitors for wife's costs in resisting application—Right of wife to pledge husband's credit for necessaries—Married Women's Property*

[Reported by Miss P. STANLEY, Barrister-at-Law.]

Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17—*Summary Jurisdiction (Married Women) Act,* 1895 (58 *&* 59 *Vict. c.* 39), *s.* 5.
Solicitor—Costs—Husband and Wife—Agency.

A husband was mainly successful in an application which he made under section 17 of the Married Women's Property Act, 1882, in respect of his title to certain moneys and property which his wife disputed. The wife was ordered to pay one-fifth of his costs. In an action by the wife's solicitors claiming from him the amount of their professional charges for resisting the application on their client's behalf, the husband pleaded that the common law rule that in certain circumstances a wife was entitled to pledge her husband's credit for necessaries had no application to the costs of proceedings under section 17 of the Married Women's Property Act, 1882:—

Held, (1) that the solicitors had discharged the burden of proving that the wife was compelled by financial stress to pledge her husband's credit and that she had acted reasonably in resisting the application.

(2) That section 17 meant no more than that on such an application the court inter partes had complete jurisdiction over costs, and that the solicitors were entitled to recover their costs from the husband at common law.

Cale v. *James* [1897] 1 Q.B. 418; 13 T.L.R. 169 distinguished.

ACTION.

In April, 1943, the defendant and his wife were married; on March 20, 1945, as a result of quarrels the defendant left his wife permanently, and on June 14 he issued a summons under section 17[1] of the Married Women's Property Act, 1882, in respect of the title to certain moneys and to the lease of the flat which had been the matrimonial home and in which the wife had remained. On July 4, 1945, the wife filed a petition for restitution of conjugal rights, praying for, inter alia, alimony pending suit; she obtained a decree and on May 9, 1947, there was final disobedience to the order.

On October 20, 1948, the final order (on appeal from a master) was made in the proceedings under section 17 of the Married Women's Property Act, 1882; the general result of that order was that the defendant established his right to practically all the moneys that were in dispute and his title to the lease of the flat, but the wife succeeded in maintaining her position in the

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[1] Married Women's Property Act, 1882, s. 17: "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England . . . and the judge of the High Court of Justice . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, . . ."

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flat until the defendant had found suitable alternative accommodation and in keeping some of the furniture. The wife was ordered to pay one-fifth of the husband's taxed costs.

On January 7, 1949, the wife successfully presented a petition for divorce; the suit was undefended and the decree nisi was made absolute on August 10, 1949.

On November 23, 1949, the wife's proceedings for alimony pending suit came before the Court of Appeal and were referred back for further inquiry and investigation. On March 25, 1950, the wife remarried, and finally, on May 13, 1951, she accepted a sum of £500 from the defendant in full settlement of her claim for alimony.

In the result, apart from what the defendant had paid to his own solicitor, he paid over £1,000 to his wife's solicitors in respect of these matrimonial proceedings. In relation to the restitution proceedings the husband tacitly accepted the position that his wife was an agent of necessity but he expressly safeguarded his position in relation to the costs of the summons under the Married Women's Property Act, 1882.

The plaintiffs, the solicitors who acted for the wife in the proceedings under section 17 of the Act of 1882, claimed from the defendant £169 14s. 2d. (subject to taxation), being their professional charges for work done and moneys expended by them on her behalf.

The defendant pleaded, inter alia, (i) that since the wife had got sufficient private means of her own she was not entitled to pledge his credit, and (ii) that the common law rule under which in certain circumstances a wife was entitled to pledge her husband's credit for necessaries had no application to the costs of proceedings between husband and wife under section 17 of the Married Women's Property Act, 1882.

Neville Faulks for the plaintiffs. When the wife incurred these legal costs in matrimonial proceedings she was an agent of necessity of her husband; the plaintiffs have discharged the burden of proving that the wife had insufficient means of paying her own legal costs (*Durnford* v. *Baker* [2]). If that be right, she can, in certain circumstances, render her husband liable at common law to pay the whole of the costs incurred in matrimonial proceedings: *Michael Abrahams, Sons & Co.* v. *Buckley* [3] and the cases therein cited. From the older cases it seems probable that the condition that the wife has insufficient means of her own is dispensed with in the case of credit being given by a solicitor.

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[2] [1924] 2 K.B. 587; 40 T.L.R. 757.

[3] [1924] 1 K.B. 903; 131 L.T. 412.

Section 17 of the Married Women's Property Act, 1882, leaves the question of costs to the discretion of the judge. *Cale* v. *James*,[4] which was decided under the Summary Jurisdiction (Married Women) Act, 1895, should be distinguished, since that Act was dealing with special circumstances and the rights of persons who seek the aid of the tribunal under that Act are limited strictly by that Act.

Phillimore Q.C. and *H. Brown* for the defendant. The wife was not an agent of necessity when the work was done for her by the plaintiffs; nor have the plaintiffs discharged the necessary burden of proving that she had insufficient means to pay for the work of solicitors herself. The order, made under section 17 of the Act of 1882, was for the wife to deliver up to the defendant possession of certain property claimed by him and to pay one quarter (varied on appeal to one fifth) of the costs of the proceedings. The jurisdiction under the Act of 1882, particularly having regard to the situation at the time when the Act was passed, creates an individual compartment in the law wherein any right to costs depends entirely on the award of the judge. Otherwise a wife who is impecunious can pledge her husband's credit, with the result that at the conclusion of litigation from which ex hypothesi the husband emerges wholly victorious he pays his own legal expenses and his wife's. *Cale* v. *James*[4] supports this view and should on the grounds of common sense and practical working be extended to section 17 of the Act of 1882.

STABLE J. stated the facts substantially as set out above, referred to the defences argued before him, and continued: I confess that it seems to me a little unfortunate that the position of the wife has been described in these matters as an agent of necessity. I should have thought that there was a distinction between the agent who derives an authority to pledge the credit of a principal in some sudden emergency, which is the agent of necessity in its strictest sense, and the position of a wife who derives her right to pledge her husband's credit for the necessaries of life because she is his wife. That right, of course, goes back in our social history to the time when a woman was for practical purposes a chattel, and once the husband had got hold of his wife he not only took the woman but he took everything that she possessed. The result, of course, was that if he did not provide for her, she had no possible means of providing for herself. That was the origin of the old common law right. As is well known, that authority derives not so much from necessity as from status, and disappears if the wife commits adultery and thereby forfeits her rights as a wife, albeit the fact of adultery is neither known nor suspected by the solicitor or tradesman or doctor or whoever it may be who gives the credit. It may be that the changed social conditions and the completely changed status of women may ultimately result in some further amendment of the law.

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[4] [1897] 1 Q.B. 418; 13 T.L.R. 169.

Wholly distinct from that right is the jurisdiction in relation to the wife's costs which is exercised by the Probate, Divorce and Admiralty Division. There (as is well known) under certain circumstances a guilty wife is entitled to defend her status and reputation, and even if she is unsuccessful the court is not deprived of its power to direct payment to her solicitor by the husband of costs incurred by her. The judgment of Sir George Jessel M.R. in *Robertson* v. *Robertson*[1] was referred to in *Michael Abrahams, Sons & Co.* v. *Buckley*.[2] *Robertson* v. *Robertson*[3] was a case in which the wife's solicitors recovered their costs against the husband although she had been found guilty of adultery in the proceedings which they were defending, and Sir George Jessel M.R. said[4]: "Now on principle it is plain that the "whole foundation of the rule depends on the liability of the "husband to pay the necessary and fair costs of the wife's "defence. I take it that that rule is founded on the old English "law, which gave the whole personal property of the wife to "the husband, and gave him also the income of her real estate; "so that in the absence of a settlement (which, as we all know, "is a comparatively modern introduction) she was absolutely "penniless, and, therefore, the Ecclesiastical Court not only "provided for the costs of her defence but also gave her alimony "pendente lite so as to provide for her maintenance. Of course "the husband may say 'It is a hardship on me to have to pay "'the costs of my wife's false defence to a charge of adultery, "'or the costs of a false counter-charge against myself of

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[1] (1881) 6 P.D. 119.

[2] [1924] 1 K.B. 903; 131 L.T. 412.

[3] 6 P.D. 119.

[4] Ibid. 122.

"'adultery or cruelty.' No doubt it is a hardship, but what "would the wife have to say in answer? Suppose the wife had "brought him a sum of £10,000, or £20,000, or £50,000, would "not she have a right to say 'You have taken all my property "'from me, and am I to be left defenceless and not able to meet "'your false charge of adultery?' Of course it is manifest that "there must be money provided for the wife to defend herself, "and who is to take up the defence? Only a solicitor, who must "look for payment, not to the wife, who has nothing, but to "the husband; and therefore it was quite right to secure him "that payment by getting money paid into court, and finally "by payment of the proper costs incurred when the suit was "heard."

These days one is apt to forget that until comparatively recently it was impossible to obtain a judgment against a married woman unless she was a trader, in which case she was bound personally. The most one could do was to get a judgment which bound any effects which she might have. She was not in a position in which she could make a binding contract; she could only bind her separate estate.

It is clear that the common law right and the right in a matrimonial court are two wholly separate and distinct rights. The common law right is the right of an innocent wife to pledge her husband's credit. The rules that regulate these matters in the divorce court are designed to see that women are enabled to defend their status and their reputation even though they may have committed grave matrimonial offences.

Mr. Faulks strongly relied on a number of authorities; first *Michael Abrahams, Sons & Co.* v. *Buckley*,[5] where McCardie J. referred to a great number of cases; and there is no doubt that that case is an accepted authority for the proposition that the wife may, in certain circumstances, as agent for her husband render her husband liable at common law to pay the whole of the costs incurred by her in matrimonial proceedings against him. In that case the proceedings never reached a successful issue; I do not think that they ever reached an issue at all. None the less, once it was shown that the solicitor acted on reasonable grounds and made adequate inquiries and showed proper diligence and care, McCardie J. held that the solicitor was entitled to recover the costs against the husband. It was suggested by Mr.

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[5] [1924] 1 K.B. 903.

Faulks that that case and some of the older cases cited therein lay down an exception to the rule that one of the conditions requisite before a wife can pledge her husband's credit is that she has insufficient means of her own; and that that condition is inapplicable where the credit is given, not by a tradesman or a doctor but by a solicitor. I do not think that that is the law; I do not think that there are any authorities cited in that case to support it; but there are authorities cited in that case which assert the contrary. I venture to think that exactly the same considerations apply whether one is concerned with a tradesman or with a solicitor, mutatis mutandis.

The next question, if that is right, is: Had the defendant's former wife sufficient private means? The sum involved is only £169 14s. 2d.; and it appears that this woman with her new husband is now living in Australia. I have allowed certain affidavits that have been used in this prolonged series of encounters to be put in evidence for what they were worth, and I have heard the evidence of Mr. Nabarro. I think that the burden of proof here is on the solicitors; I think that, before they establish the agency of necessity, the burden lies on them to prove that the wife was compelled by financial stress to pledge her husband's credit. It is worthy of remark that the husband has called no evidence before me to the effect that his wife, apart from trifling personal matters of clothing and so on, and her engagement ring and some occasional gifts, ever possessed a penny piece.

Mr. Nabarro, the solicitor, knows something of the wife's history. [His Lordship then reviewed the evidence as to the wife's circumstances and continued:] I have come to the conclusion here that when Mr. Nabarro was retained for the purposes of this summons, and throughout the proceedings in connexion with this application under section 17 of the Married Women's Property Act, 1882, the wife was forced by straitened circumstances either to pledge her husband's credit to employ a solicitor or to do without one. As regards the issue of the proceedings, although the result may fairly be said to have been somewhat, perhaps considerably, in the husband's favour, I think that the wife was perfectly reasonable in fighting the summons; it was highly advantageous to her to do so, and she achieved a very considerable measure of success. Indeed, she was left in the flat until alternative accommodation was found for her by the husband —a fairly permanent measure of success.

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Stable J.

That brings me to the last and important point in this case which has caused me a good deal of vacillation. Mr. Phillimore's argument is this: He says that the jurisdiction under the Act of 1882, particularly having regard to the situation which prevailed at the time when that Act was passed, creates a very peculiar individual compartment in the law wherein any right to costs depends entirely on the award that is made by the judge who decides any particular matter. That argument, on the basis of what is convenient, seems to have a good deal of force behind it. It does seem to have been a remarkable thing that, having regard to present day social conditions (very often a woman is in a much better financial position than her husband), if there is a dispute about property between husband and wife, and the wife puts forward a claim which she cannot and does not sustain successfully, provided that she is impecunious and has no means of her own, she can employ a solicitor and pledge her husband's credit to pay his bill, with the result that at the conclusion of litigation from which ex hypothesi the husband emerges wholly victorious, he has the privilege of paying his own legal expenses as well as his wife's, which may amount to a sum considerably in excess of the property in dispute; and I confess that, if I thought that the contention advanced by the husband were consistent with the law as the authorities state it to be, the result would be by no means undesirable. It does seem to me, as a matter of pure convenience, that where married couples meet on this particular battlefield, rather different rules should apply from those applicable to other branches of inter-domestic strife in this building.

In support of his argument, Mr. Phillimore cited *Cale* v. *James*.[6] I say at once that it is perfectly plain that McCardie J. did not think very highly of that decision, as appears from his observations in *Michael Abrahams, Sons & Co.* v. *Buckley*.[7] In *Durnford* v. *Baker*,[8] which is an extremely interesting case, Atkin L.J. said[9]: "This is an action by a solicitor against a "husband on the ground that the husband has contracted to "pay him the costs incurred in presenting a divorce petition "on behalf of the wife. The contract depends on whether the "wife had authority to pledge her husband's credit. The solicitor in such a case has no independent right. As Wright J. said

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[6] [1897] 1 Q.B. 418; 13 T.L.R. 169.

[7] [1924] 1 K.B. 903.

[8] [1924] 2 K.B. 587; 40 T.L.R. 757.

[9] [1924] 2 K.B. 600.

"in *Cale* v. *James*[10]: 'It cannot be denied that the solicitor's "'rights are derivative.' I prefer to say nothing as to whether "the actual decision in that case was right." I confess that I do not quite follow what Atkin L.J. means when he says that the solicitor has no independent right. Of course, it is true to say that he has no additional or other right; the right which he has is the right that Atkin L.J. states in the first sentence of his judgment: "This is an action by a solicitor against a husband "on the ground that the husband has contracted to pay him "the costs incurred in presenting a divorce petition on behalf "of the wife": it is no more and no less than that. It is true that the wife is the instrument or agent by which the contract is made, and in that sense, and in that sense alone, it seems to me that the solicitor's rights are derivative. They are direct rights which he acquires by the instrumentality of the agent, who is able to form a binding contract in his favour which he, the solicitor, is in a position to enforce.

Cale v. *James*[10] arose out of summary proceedings under the Summary Jurisdiction (Married Women) Act, 1895. That Act really created an entirely new jurisdiction in relation to matrimonial proceedings. It was in a sense the beginning of a poor man's divorce court and conferred on courts of summary jurisdiction certain powers in dealing with complaints of certain kinds by married women against their husbands. Amongst the powers then conferred on the court by section 5 was this: "The "court of summary jurisdiction to which any application under "this Act is made may make an order or orders containing all "or any of the provisions following, viz.:— . . . (*d*) A provision "for payment by the applicant or the husband, or both of them, "of the costs of the court and such reasonable costs of either "of the parties as the court may think fit." The facts of *Cale* v. *James*[10] were that the wife instructed a solicitor who took proceedings under the Act based on an allegation of persistent cruelty. A court of summary jurisdiction made no order—equivalent, apparently, to dismissing the application; no provision for payment of costs was made, and no order in relation to costs was asked for either by the wife or by the wife's solicitors. The solicitors subsequently sued the husband in the county court for the costs of the wife in the matter of the two applications, and the county court judge gave judgment for the solicitors for their costs subject to taxation. The husband appealed to the Divisional Court, which reversed the judgment of the county court judge. Wright J. said[11]: "I have come to the conclusion that "the legislature in passing the Summary Jurisdiction (Married "Women) Act, 1895, did not intend that in cases under that Act "proceedings for the costs, involving further expense, might "be taken in another court. It was not intended that, having "made it possible to make the application for costs to a court "of summary jurisdiction, an action for costs should be maintainable in any other court. The Act intends that all questions "as to costs shall be dealt with by the court of summary jurisdiction, and uses language which strongly indicates that intention. It leaves the court perfectly free to make any order "as to costs it may think fit against either the wife or the "husband. It may, no doubt, be argued that the provision "found in section 5 (*d*) does not prejudice the rights of the "married woman's solicitor to recover his costs against the "husband before another tribunal. That question turns on the "true construction of the Act, and it cannot, I think, be denied "that the solicitor's rights are derivative." I confess that I find it difficult to appreciate quite what that means. "If it be true "to say that the Act intends that all costs should be paid "according to the direction of the court of summary jurisdiction, "we ought, in my opinion, to hold that the provision binds the "solicitor as well as the wife." Bruce J. said[12]: "The Act in "question gives a summary procedure for the benefit of married "women, the object being to enable poor persons to obtain without any great expense the protection which formerly they could "only obtain by more expensive proceedings. The Act gives "the court of summary jurisdiction full power to deal with "all costs; and it is, in my opinion, only reasonable to suppose "that the legislature intended that the question of costs should "be dealt with exclusively by that court. I therefore come "to the conclusion that an action will not lie to recover costs "incurred in respect of applications under the Act. That is the "ground of my decision."

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[10] [1897] 1 Q.B. 418, 420.

It is quite obvious that that case is binding on me, but I say with great respect that, even if it were not, although one sees the force of the argument that subsection (*d*) merely defined rights in relation to costs and the power of the court in relation to costs as between the actual parties before it, there is a great deal to be said in favour of the suggestion that the legislature deliberately intended to set up, if I may call it this, a poor woman's domestic protection court, in which that tribunal and that tribunal alone would have control over any liability for legal expenditure to be incurred by anybody concerned; and that, I venture to think, is the basis for the decision in *Cale* v. *James.*[13]

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[11] [1897] 1 Q.B. 418, 420.

[12] Ibid.

Taking that case as binding on me, ought I to extend it to the case of a summons brought under section 17 of the Married Women's Property Act? I confess that I feel rather an inclination in that direction if I could properly go there, but I think that it would be extending *Cale* v. *James* [13] if I were to say that the principle there stated should be extended to section 17. Obviously, the Summary Jurisdiction Act of 1895 is intended for people in very humble circumstances. Section 17 is equally applicable to a dispute between a millionaire and a millionairess who happen to be married, each having vast wealth in his and her own right. The section really seeks, not to provide a poor man's court but to get over the difficulty that a husband and wife in the eyes of the law of 1882 were deemed to be one. The section provides: "In any question between husband and wife as to "the title to or possession of property, either party," and then it is not unimportant to look at the next words, "or any such "bank, corporation, company, public body, or society as aforesaid "in whose books any stocks, funds, or shares of either party are "standing, may apply by summons or otherwise in a summary "way to any judge of the High Court of Justice in England . . . "and the judge of the High Court of Justice . . . may make "such order with respect to the property in dispute, and as "to the costs of and consequent on the application as he thinks "fit." I think that that merely means that the court inter partes has complete jurisdiction over the costs. I do not think that it goes further than that, and when I look at the terms of Ord. 65, r. 1, "Subject to the provisions of the Act and these rules, "the costs of and incident to all proceedings in the Supreme "Court . . . shall be in the discretion of the court or judge," and having regard to the fact that people of indefinite wealth, banks, corporations and all sorts of other important bodies may litigate under the provisions of the section, I do not think that it would be right to extend the principle in *Cale* v. *James* [13] to proceedings under that section. It may be that the legislature may think fit to intervene and make some further provision which will prevent impecunious wives from involving their husbands in litigation under that particular section which, whatever the result may be, must end in the financial discomfiture of the husband; but that is the business of the legislature if they so think, and not for me.

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[13] [1897] 1 Q.B. 418.

Judgment for the plaintiffs.

Solicitors: *J. N. Nabarro & Sons; Gordon, Dadds & Co.*

1955
Mar. 28, 29.

Sellers J.

CASTLE LAUNDRY (LONDON) LD. *v.* READ.

Landlord and Tenant—Act of 1954—*Business premises—Contractual provisions for determination of tenancy at end of seventh and fourteenth year—Notice to quit given by landlord before and expiring after coming into operation of Act—Second notice to quit in prescribed form given by landlord after the contractual date for first break—Contractual tenancy determined by first notice—"Business statutory tenancy"—Date of termination specified in notice not earlier than the earliest date on which apart from the Act the tenancy could have been brought to an end—Landlord and Tenant Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *ss.* 23, 24, 25.

By section 24 (1) of the Landlord and Tenant Act, 1954: "A "tenancy to which this Part of this Act applies shall not come to "an end unless terminated in accordance with the provisions of "this Part of this Act." By section 25: "(1) The landlord may "terminate a tenancy to which this Part of this Act applies by "a notice . . . in the prescribed form . . . (3) (*a*) the date of "termination specified in a notice under this section shall not be "earlier than the earliest date on which apart from this Part of "this Act the tenancy could have been brought to an end by notice "to quit given by the landlord on the date of the giving of the "notice under this section."

A lease of business premises for a term of 21 years from December 25, 1947, provided for determination by either side at the expiration of the seventh or fourteenth year of the term on six months' previous notice in writing being given. On June 11, 1954, the landlord served on the tenants a valid notice under the lease to quit and deliver up possession on December 25, 1954. On October 1, 1954, the Landlord and Tenant Act, 1954, came into operation, and on January 19, 1955, the landlord served on the tenants a second notice in the prescribed form under the Act terminating their tenancy on July 22, 1955:—

Held that, the notice of June 11, 1954, operated to determine the contractual tenancy on December 25, 1954, in accordance with the provisions of the lease and that thereafter the tenancy continued as a "business statutory tenancy" under the Act, which was properly determined by the notice of January 19, 1955, and that it made no difference that the contractual date for the first break had passed, for, since the contractual tenancy had been determined on December 25, 1954, the notice was not given for an earlier date than the date for which the lease provided and did not, therefore, contravene the provisions of section 25.

ORIGINATING SUMMONS.

By a lease dated March 20, 1947, a shop, greenhouse and premises at Bedford Hill, Balham, were let to the plaintiffs, Castle Laundry (London) Ld., for a term of 21 years from December 25, 1947. By clause 3 (*b*) the lease provided that "If either the lessors or the lessee shall desire to determine the "present demise at the expiration of the seventh or fourteenth "year of the said term and shall give to the other of them six "months' previous notice in writing of such desire . . . then "immediately on the expiration of such seventh or fourteenth "year as the case may be this present demise and everything "herein contained shall cease and be void. . . ."

On June 11, 1954, the landlord, the present defendant, desiring to terminate the lease at the end of the first seven years, served on the plaintiffs notice to quit and deliver up possession on December 25, 1954. On July 30, 1954, the Landlord and Tenant Act, 1954, received the Royal Assent, and by section 70 (2) came into force on October 1, 1954. On August 19, 1954, the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954, No. 1107) were made and were brought into operation on August 27, in the exercise of the powers conferred on the Lord Chancellor by section 66 and the Ninth Schedule to the Act. On January 19, 1955, the landlord served on the plaintiffs a second notice to quit in the form prescribed by the Landlord and Tenant (Notices) Regulations, 1954, terminating their tenancy on July 22, 1955.

The plaintiffs took out an originating summons asking (a) whether having regard to the terms of the lease and of the Landlord and Tenant Act, 1954,[1] the term of years would determine on July 22, 1955, by virtue of the notice dated January 19, 1955, and (b) whether the landlord had power to determine the term by notice served to expire on any date prior to December 25, 1961, and for a declaration in the terms of the answers to those questions.

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[1] Landlord and Tenant Act, 1954, s. 24: "(1) A tenancy to which this "Part of this Act applies shall not "come to an end unless terminated "in accordance with the provisions of "this Part of this Act; . . . (2) The "last foregoing subsection shall not "prevent the coming to an end of a

It was admitted that the tenancy was a tenancy of business premises to which Part II of the Act applied, that the notice to quit dated June 11, 1954, was a good notice in accordance with the terms of the lease and that the notice of January 19, 1955, complied with the requirements of the regulations.

J. P. Widgery for the plaintiffs. The Landlord and Tenant Act, 1954, applies and the tenancy can be determined only in accordance with the provisions of the Act. The lease specifically provides for a notice to quit and therefore the case falls squarely under section 25 (3). Under that subsection the situation must

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"tenancy by notice to quit given by "the tenant, by surrender or forfeiture, or by the forfeiture of a "superior tenancy. (3) Notwithstanding anything in subsection (1) "of this section,—(*a*) where a tenancy "to which this part of this Act applies "ceases to be such a tenancy, it shall "not come to an end by reason only "of the cesser, but if it was granted "for a term of years certain and has "been continued by subsection (1) of "this section then (without prejudice "to the termination thereof in accordance with any terms of the tenancy) "it may be terminated by not less "than three nor more than six "months' notice in writing given by "the landlord to the tenant; (*b*) "where, at a time when a tenancy "is not one to which this Part of this "Act applies, the landlord gives notice "to quit, the operation of the notice "shall not be affected by reason that "the tenancy becomes one to which "this Part of this Act applies after "the giving of the notice."

S. 25: "(1) The landlord may terminate a tenancy to which this Part "of this Act applies by a notice given "to the tenant in the prescribed form "specifying the date at which the "tenancy is to come to an end (hereinafter referred to as 'the date of "'termination'): . . . (2) Subject to "the provisions of the next following "subsection, a notice under this section shall not have effect unless it is "given not more than twelve nor less "than six months before the date of "termination specified therein. (3) In "the case of a tenancy which apart "from this Act could have been "brought to an end by notice to quit "given by the landlord—(*a*) the date "of termination specified in a notice "under this section shall not be "earlier than the earliest date on "which apart from this Part of this "Act the tenancy could have been "brought to an end by notice to quit "given by the landlord on the date of "the giving of the notice under this "section; and (*b*) where apart from "this Part of this Act more than six "months' notice to quit would have "been required to bring the tenancy "to an end, the last foregoing subsection shall have effect with the "substitution for twelve months of a "period six months longer than the "length of notice to quit which would "have been required as aforesaid. "(4) In the case of any other tenancy, "a notice under this section shall not "specify a date of termination earlier "than the date on which apart from "this Part of this Act the tenancy "would have come to an end by "effluxion of time."

be looked at on the day on which notice to quit under the Act is given, and the question to be asked is: What, if notice were given on that day independently of the Act, would be the earliest date on which the tenancy could have been determined? In the present case, once the date December 25, 1954, had passed, the tenancy, by the terms of the lease, could not have been determined until December 25, 1961. The notice given on January 19, 1955, was therefore invalid, and the landlord could not give a notice operating to determine the tenancy on any date prior to December 25, 1961.

Charles Lawson for the defendant landlord. The notice served on June 11, 1954, was effective to determine the tenancy on December 25, 1954, under the law in force prior to the coming into operation of the Landlord and Tenant Act, 1954. That notice was therefore valid and effective, and it could have been served at any time during the first seven years of the term, for by clause 3 of the lease the mere expression of the desire to terminate, followed by six months' notice, was effective to convert the 21 year term into a seven year term. Section 25 (3), therefore, does not apply. The statute contains no provision for retrospective operation, so that neither it nor the regulations, which did not come into force until August 27, 1954, after the notice had been given, can invalidate the notice, and therefore, when the Act came into operation on October 1, 1954, it was on the residue still subsisting of the seven year term that it took effect.

In *Orman Brothers Ld.* v. *Greenbaum* [2] neither Devlin J. nor the Court of Appeal were considering a notice served before the coming into operation of the regulations; the view of Romer L.J.[3] that a notice served prior to October 1, 1954, is invalid unless in the prescribed form is obiter, and not referable to a notice such as this; and see the remarks of Lord Goddard C.J.[4]

The Act introduced a fundamentally new conception into the law of landlord and tenant in that under it the tenant continues to hold after his tenancy has expired by effluxion of time unless notice to quit is given in the prescribed form. In the present case the effect of the Act was that when the contractual tenancy expired on December 25, 1954, there came into operation a statutory tenancy which could be terminated by a notice in the prescribed form, which notice could have been given at any time

[2] [1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731; [1955] 1 W.L.R. 248; [1955] 1 All E.R. 610.

[3] [1955] 1 W.L.R. 248, 253.

[4] Ibid. 252, 253.

after August 27, 1954; such a notice was served by the landlord on January 19, 1955, and therefore that statutory tenancy was properly determined. Where the Act refers to a tenancy it does not refer to the ordinary conception of tenancy, but contemplates that the contractual relationship ceases and that thereafter the tenant holds under the Act.

J. P. Widgery in reply. The conception of a statutory tenancy is attractive, but the provisions of this Act cannot be compared with those of the Rent Restriction Acts; compare the provisions in those Acts, for example, "No order . . . for . . . possession " . . . shall be made" (in section 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920), with section 24 (1) of this Act, "A tenancy . . . shall not come to an end," which is inconsistent with the argument that the tenancy does come to an end. If the contractual tenancy was continued under the Act the notice to quit terminating it on December 25, 1954, must be inoperative, and, if the tenancy does continue, it must do so on the terms of the lease. If the contractual tenancy was determined, it is conceded that section 25 (3) does not apply, but section 24 (1) is relied on as preserving the tenancy unless and until notice to quit according to the provisions of the Act has been given. The remarks of Lord Goddard C.J. in *Orman Brothers Ld.* v. *Greenbaum*[5] were obiter; the question in that case was not the same as in the present case, and it was not argued that a notice served in June could not bring a tenancy to an end after October 1, 1954.

SELLERS J. By this originating summons the plaintiffs seek two declarations in respect of a lease under which they, as successors in title, are the tenants and the defendant is the landlord. The lease, dated March 20, 1947, is in respect of business premises, 61, Bedford Hill, Balham, London, for a term of 21 years running from December 25, 1947, but it contains a clause—clause 3 (*b*)—which permits, in certain circumstances, an earlier termination. That clause reads as follows: "If either "the lessors or the lessee shall desire to determine the present "demise at the expiration of the seventh or fourteenth year "of the said term and shall give to the other of them six "months' previous notice in writing of such desire and shall in "the case of the lessee up to the time of such determination "pay the rent and up to the date of such notice perform and

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[5] [1955] 1 W.L.R. 252, 253.

"observe the covenants on its part hereinbefore contained then "immediately on the expiration of such seventh or fourteenth "year as the case may be this present demise and everything "herein contained shall cease and be void but without prejudice "to the remedies of either party against the other in respect "of any antecedent claim or breach of covenant."

The desire of the landlord being to invoke that clause and to terminate the lease at the first opportunity at the end of the seven year period, he gave notice on June 11, 1954, expressing his desire, and giving the tenants, the plaintiffs in this action, notice to quit and to deliver up possession on December 25, 1954. It is agreed that that was a proper notice under the lease and one which, so far as the contractual relationship between the parties was concerned, would have brought this lease to an end on December 25, 1954, and that the other provisions in the lease which were available for its further performance would, in accordance with clause 3 (*b*), have ceased to have any effect, and everything else would have been void.

But, intervening between the date of that notice and the period of its expiration on December 25, 1954, the Landlord and Tenant Act, 1954, which received the Royal assent on July 30, 1954, by section 70, came into force on October 1 of that year. By provision made in the Act the Lord Chancellor was empowered to make regulations with regard to the form of a notice to quit under the Act, and those regulations were in fact made on August 27, 1954. Part II of the Act makes special provision for what might be termed a business statutory tenancy, to give security of tenure to a tenant of that character, and section 23 (1) provides: "Subject to the provisions of this Act, this Part of "this Act applies to any tenancy where the property comprised "in the tenancy is or includes premises which are occupied by "the tenant and are so occupied for the purposes of a business "carried on by him or for those and other purposes." By subsection (2) it is provided: "In this Part of this Act the "expression 'business' includes a trade, profession or employ-"ment and includes any activity carried on by a body of persons, "whether corporate or unincorporate." Clearly the Act applies to these premises, because at the time when it came into operation, on October 1, 1954, the lease was still subsisting; although the notice had been given, it did not expire until December of that year, so that there was a residue of the term still subsisting and the Act had its effect upon it.

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The provisions relating to such premises are set out, so far as the present case is concerned, in sections 24 and 25. [His Lordship read section 24 (1) and continued:] Having regard to those provisions, the landlord, on January 19, 1955, gave a notice, which it is said by him complied with the requirements of section 24 (1), in that it was a notice seeking to determine the tenancy which "shall not come to an end unless terminated in "accordance with the provisions of this Part of this Act," and which it was said was in accordance with the provisions of the Act, set out in section 25 as follows: "(1) The landlord may "terminate a tenancy to which this Part of this Act applies "by a notice given to the tenant in the prescribed form "specifying the date at which the tenancy is to come to an end "(hereinafter referred to as 'the date of termination'): Provided that this subsection has effect subject to the provisions "of Part IV of this Act as to the interim continuation of "tenancies pending the disposal of applications to the court. "(2) Subject to the provisions of the next following subsection, "a notice under this section shall not have effect unless it is "given not more than twelve nor less than six months before "the date of termination specified therein."

The notice of January 19, 1955, given by the landlord was a notice terminating the tenancy on July 22, 1955, which complies with section 25 (2) as regards duration. What is said on behalf of the landlord—and, I think, accurately said—is that, having regard to the fact that October 1, 1954, had passed, the Act makes it impossible to terminate a tenancy unless it is terminated in accordance with the provisions of the Act, and the Act, through the regulations, has specified the appropriate form of notice terminating the tenancy, and that that notice has been given. The contractual tenancy, it is said, came to an end on December 25, 1954, but, because of the operation of section 24, the tenancy did not come to an end, and could not come to an end unless terminated in accordance with the Act; the tenancy was said, I think rightly, to continue as a business statutory tenancy which, the landlord now contends, has been terminated by the notice which the Act requires.

On behalf of the tenants it is said that although that notice had been given and although it complies with the prescribed form, nevertheless it is ineffective by reason of the provisions of section 25 (3) and (4) of the Act. [His Lordship read section 25 (3) and (4) and continued:] Those two provisions seem to me to operate in this way; that where there is a tenancy which has its own specified terms as to termination, then the Act gives no earlier date on which the tenancy can be brought to an end. As applied to this case, the earliest date may be the breaking period provided by clause 3 (*b*) of the lease, or the final period, but the date on which the tenancy could be determined by a notice under the Act can be no earlier than that which the contract itself specifies. That presents no difficulty for the landlord, because the contractual tenancy had in fact, by valid notice given in June, 1954, come to an end; the date December 25, 1954, is just as final as if it had been the original date for the termination of the tenancy, so that it would operate as if it were a date arising from effluxion of time. In my opinion it is erroneous to contend that, because the notice under the Act is dated January 19, 1955, after the date of the first break had passed, it is ineffective, and that the earliest date which could be named is the next break, after 14 years, in December, 1961. That is viewing the position as if the notice of June 11, 1954, had never been given. If that notice had never been given, then I think that the contention by counsel for the tenants would have been right; but, that notice having operated to bring the lease—the contractual obligation between the parties—to an end in December, 1954, then the position in regard to section 25 (3) and (4) is that, the date of December 25, 1954, having been passed, this notice has not been given for any earlier date than the date for which the lease itself provided, and therefore the operation of the notice established the proper date for the determination.

For those reasons, I think that the answer to the two questions put to the court in the summons are both in the affirmative in substance, but the formal order can be agreed.

It may well be that if the landlord had had the foresight and the inclination, he might have given his notice earlier than he did, for it seems to me that, on the proper construction of this Act and the provisions made for the regulations under the ninth schedule, it may well be that the notice under the Act, as distinct from the notice of June 11, 1954, under the lease, might have been given at any time after August 27, 1954. The ninth schedule provides: "1. The power under section 66 of "this Act to make regulations prescribing forms of notices for "the purposes of this Act may be exercised at any time after "the passing and before the commencement of this Act so as to "bring the regulations into operation at any time after they are "made;"—That power was invoked in the regulations made on

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August 27. The paragraph continues: "and where the date, or "the end of a period, specified by a notice which is given in a "form so prescribed falls after the time at which this Act comes "into operation the notice shall not be invalid by reason only "that it was served before that time." That seems to me to recognize that notice in the prescribed form—once the prescribed form was laid down—could have been given at any time after August 27, provided that it did not seek to terminate the tenancy earlier than it could have been terminated under the terms of the lease.

Declaration accordingly.

Solicitors: *Sydney Morse & Co.; Moon, Gilks & Moon.*

J. F. L.

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